16-458

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 109.

STATE OF GEORGIA, APPELLANT,

vs.

MORRIS K. JESUP, SURVIVING TRUSTEE; THE ATLANTIC AND GULF RAILROAD COMPANY, AND EUGENE KELLY AND SAMUEL A. STRANG, TRUSTEES; AND THE ATLANTIC AND GULF RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

FILED OCTOBER 20, 1879.

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1 UNITED STATES OF AMERICA,
Southern District of Georgia, ss:

At a stated term of the 5th circuit court of the United States of America, for the southern district of Georgia, held at the United States court rooms in the city of Savannah, in and for the said district, on Monday, the fourteenth day of April, in the year of our Lord one thousand eight hundred and seventy-nine.

Present, the honorable Joseph P. Bradley, associate justice of the U. S. Supreme Court, presiding, and the Hon. John Erskine, U. S. judge for Georgia.

MORRIS K. JESUP, SURVIVING TRUSTEE, &C., complainant, *and* THE ATLANTIC AND GULF RAILROAD CO. and The State of Georgia (movant), et al., defendants.	In equity. Bill of complaint.

Be it remembered that heretofore, to wit, on the fifteenth day of February, A. D. 1877, came the said complainant, by W. S. Chisholm, his solicitor, and filed his bill of complaint in the 5th circuit court of the United States for the southern district of Georgia against the said defendant company, in the words and figures following, to wit:

2 *Bill.*

In the fifth circuit court of the United States for the southern district of Georgia, in the fifth judicial circuit. In equity.

To the honorable the judges of the fifth circuit court of the United States for the southern district of Georgia, in the fifth judicial circuit:

Your orator, Morris K. Jesup, a citizen of the State of New York, surviving trustee as hereinafter mentioned, brings this his bill of complaint against the Atlantic and Gulf Railroad Company, a citizen of the State of Georgia, and thereupon your orator complains and says:

That your orator is a citizen of the State of New York, and that the said defendant The Atlantic and Gulf Railroad Company is a railroad corporation created by and organised and existing under the laws of the State of Georgia, and having its principal office and place of business within the southern district of Georgia.

3 That on or about the twentieth day of December, eighteen hundred and sixty-seven, the said The Atlantic and Gulf Railroad Company, being thereunto duly authorized and empowerd by and under its charter and the laws of the State of Georgia, and being the owner and possessor of a certain railroad in said State, extending from the city of Savannah to Bainbridge, in said State of Georgia, a distance of about two hundred and thirty-seven miles, and a branch thereof running from Dupont on the main line to the State line between Georgia and Florida, and there connecting with the leased line hereinafter mentioned, together with the appurtenances of said main line and branch, and the rolling-stock or equipment thereunto belonging, and also the leasehold interest in a certain other railroad extending from the State line between Georgia and Florida to Live Oak, in the State of Florida, a distance of sixteen miles or thereabouts, with the

appurtenances and equipment thereof, held by the said The Atlantic and Gulf Railroad Company, under lease from the Pensacola
4 and Georgia Railroad Company, and also the other things embraced in and purporting to be covered by the mortgage deed hereinafter mentioned, duly made and executed under the corporate seal of the said The Atlantic and Gulf Railroad Company, with the signatures of its president and secretary attesting the same, and delivered unto your orator and one John R. Gardner, then residing in the city of New York, and a citizen of the State of New York, and now deceased, its certain indenture of mortgage or deed of trust to your orator and said John R. Gardner as trustees, bearing date on said twentieth day of December, eighteen hundred and sixty-seven, whereby the said Atlantic and Gulf Railroad Company conveyed in mortgage unto your orator and said John R. Gardner, and the survivor of them, and his and their successors and assigns forever, the before-mentioned railroad owned and possessed by said company, extending from Savannah to Bainbridge, with the before mentioned branch from Dupont to the State line, together with the appurtenances and rolling-stock and equipment thereof, respectively, and its said leasehold interest
5 in the said railroad, extending from the State line to Live Oak, with the appurtenances and equipment thereof, together with the income, tolls, rents, issues, and profits of both said railroads, and the franchises, rights, and privileges belonging or appertaining to the same, respectively, and the other things embraced in and purporting to be conveyed by said mortgage or deed of trust, to be had and holden by your orator and the said John R. Gardner, and the survivor of them, and their or his heirs, successors, and assigns forever, in trust to secure the payment of the principal and interest of certain bonds then proposed to be issued and negotiated by said railroad company to the aggregate amount of two millions of dollars, in bonds for one thousand dollars, and for five hundred dollars each, all dated December twentieth, eighteen hundred and sixty-seven, bearing interest at the rate of seven per cent. per annum from July first, eighteen hundred and sixty-seven, payable semi-annually, on the first days of January and July in each year, at the agency of said railroad company, in the city of New York, or at their office in the city of Savannah, at the option of the holder, and the principal payable on the first day of
6 July, eighteen hundred and ninety-seven, a copy of which said indenture of mortgage or deed of trust is to this bill annexed in a schedule marked A, and which your orator prays may be taken as part of this bill.

And your orator further showeth that the execution of the said indenture of mortgage or deed of trust by the said The Atlantic and Gulf Railroad Company was afterwards duly acknowledged and authenticated according to the laws of the State of Georgia, so as to entitle the same to be recorded, and the said indenture of mortgage or deed of trust was afterwards duly recorded in accordance with the laws of the State of Georgia; and your orator further showeth that the said John R. Gardner died on or about the month of December, eighteen hundred and seventy-one, and no successor of said John R. Gardner in the trusteeship created by or under said indenture of mortgage or deed of trust has ever been appointed, and your orator, as the sole surviving trustee, is now vested with the entire estate and with the trusts, rights, and powers under said indenture which were originally vested in him and the said John R. Gardner.

7 And your orator further showeth that after the execution of

the above mentioned indenture of mortgage or deed of trust the said The Atlantic and Gulf Railroad Company duly made, executed, and issued, and negotiated and transferred for full and valuable consideration by said railroad company received therefor, the bonds of the description and form and tenor in said indenture of mortgage provided for and recited, and intended and purporting to be thereby secured, to the aggregate amount of two millions of dollars in said indenture provided for, conforming to the recital and specifications of said indenture in that behalf, accompanied by the certificate of your orator and said Gardner, as trustees, and with cupons for the interest thereon annexed thereto in the form provided for by said indenture, excepting only bonds to the aggregate amount of three hundred and thirty-four thousand dollars, parcel of said amount of two millions dollars, which bonds for three hundred and thirty-four thousand dollars remain unissued, and have been reserved from issue and negotiation because a corresponding amount of the prior sectional mortgage bonds having liens upon particular sections of the said railroad, and which were designed to be provided for by means of so-called consolidated bonds issued under the said mortgage to your orator and said John R. Gardner, have not been as yet taken up, but still remain outstanding, and have prior lien upon the respective portions of the said railroad covered thereby, but that the remainder of the said bonds issued under and secured by the said mortgage or deed of trust to your orator and said John R. Gardner—that is to say, such bonds to the aggregate amount of sixteen hundred and sixty-six thousand dollars of principal now remain outstanding and in full force and effect in the hands of the respective parties to whom the same have been duly negotiated, and who are the owners and holders thereof for value, and the holders of such bonds, who are very numerous, and your orator, as surviving trustee as aforesaid, on their behalf, are entitled to the benefit of the security provided by said mortgage or deed of trust.

8

And your orator further showeth that the said The Atlantic and Gulf Railroad Company has made default in the performance of the conditions and stipulations contained in the said indenture of mortgage or deed of trust and in the said bonds for sixteen hundred and sixty-six thousand dollars issued thereunder and secured thereby, and now outstanding as aforesaid.

9

That the said railroad company wholly failed to pay or to make any provision for the payment of, either at said company's office or agency in the city of New York, or in the city of Savannah, or elsewhere, or otherwise howsoever, the six months' interest on the said outstanding bonds for sixteen hundred and sixty-six thousand dollars, which became due and payable on the first day of January, eighteen hundred and seventy-seven, but has admitted and announced its inability to meet and pay such interest, and that on the second day of January, eighteen hundred and seventy-seven, the first day of January being a legal holiday in New York, the interest coupons falling due on said first of January upon a large amount of the said outstanding bonds for sixteen hundred and sixty-six thousand dollars, issued under and secured by said mortgage or deed of trust, were duly presented for payment at the said company's office or agency in the city of New York, and payment thereof was duly demanded, and such payment was refused for want of funds, and the said interest coupons remain wholly unpaid and in default, and that the amount of interest now in arrear and unpaid upon the said outstanding bonds for sixteen hundred and sixty-six thousand dollars, issued under and secured by said mortgage

10

or deed of trust, is fifty-eight thousand three hundred and ten dollars, and by reason of such default made in the conditions of said mortgage or deed of trust it has become your orator's duty to enforce the security of said mortgage or deed of trust upon the property and franchises embraced in and covered by said mortgage or deed of trust for the benefit and security of said bondholders, for whom your orator is trustee.

And your orator further showeth that after the execution of the said mortgage or deed of trust to your *order* and the said John R. Gardner, the said The Atlantic and Gulf Railroad Company purchased and became the owners of and they still own the railroad, with
11 its appurtenances, extending from the State line between Georgia and Florida to Live Oak, in the State of Florida, a distance of about sixteen miles, which had been leased to the said The Atlantic and Gulf Railroad Company by the Pensacola and Georgia Railroad Company by the indenture of lease dated November nineteenth, 1867, which lease was embraced in and covered by the said indenture of mortgage or deed of trust to your orator and said John R. Gardner, and such railroad line in Florida between the State line and Live Oak has been and is used and operated together with the branch of the said Atlantic and Gulf Railroad situate in the State of Georgia extending from Dupont on the main line of the Atlantic and Gulf railroad, a distance of thirty-two miles or thereabouts, to the point of connection on the State line between Georgia and Florida, and there is thus formed and has been and is being operated by the said The Atlantic and Gulf Railroad Company a continuous line of railroad about forty-eight miles in length, extending from Dupont, in Georgia, to Live Oak, in Florida, running as a branch of and in connection with the
12 main line of the Atlantic and Gulf Railroad between Savannah and Bainbridge, and the freight and passenger business of said branch line to Live Oak, as thus connected, forms a very important and valuable portion of the through freight and passenger business of the said Atlantic and Gulf Railroad, having as well a local business, and constitutes an important portion of the security of the bondholders, for whom your orator is trustee as aforesaid.

And your orator further showeth that in addition to the before-mentioned line from Savannah to Bainbridge and the said branch from Dupont to Live Oak, the said The Atlantic and Gulf Railroad Company also possesses, owns, and operates in connection with and as part of its said railroad the following described other lines of railroad situate in the State of Georgia, that is to say, a branch of its said railroad about fifty eight miles in length, extending from Thomasville, on the main line between Savannah and Bainbridge, to Albany, in the county of , in said State of Georgia, which said branch formerly belonged to the South Georgia and Florida Railroad Company, and
13 is subject to a lien in favor of the State of Georgia created before said road became the property of the Atlantic and Gulf Railroad Company, and which is paramount to its title, for the principle and interest of certain bonds to the amount of six hundred and sixty-four thousand dollars, or thereabouts, and likewise two short branches used in connection with and as part of said main line, viz, one of about two miles in length extending from the depot in the city of Savannah to the wharves on the Savannah River, including such wharves, this branch being subject to a purchase-money mortgage of thousand dollars, or thereabouts; and one of about four miles in length, known as the junction branch connecting the main line aforesaid with

the Savannah and Charleston Railroad, this branch being subject to a purchase-money mortgage of fifty thousand dollars, or thereabouts.

And your orator further showeth that the before-mentioned prior and paramount lien upon the said branch line from Thomasville to Albany for six hundred and sixty-four thousand dollars, and interest, or
14 thereabouts, is accompanied by a right of the State of Georgia to enter upon and take possession of the said line of railroad, with its appurtenances, in case of default being made in the due payment of the interest upon said bonds as it falls due; that such interest is payable semi-annually, and a semi-annual installment of interest upon such bonds, or upon a large proportion thereof, will fall due on the day of May next; that the said branch line between Albany and Thomasville is a very important and valuable portion of the railroad line of the said Atlantic and Gulf Railroad Company, and contributes, by its business, a large and important portion of the through freight and passenger business of the said main line, which would be liable and likely to be diverted to another line of transportation in case the said branch line to Albany should pass out of the control of the said Atlantic and Gulf Railroad Company or the representatives of its title and interest, and such branch line, with its connections and the business flowing to the main line therefrom, constitutes a very important and valu-
15 able portion of the security of the bondholders for whom your orator is trustee, and the maintenance of said branch under the control of said Atlantic and Gulf Railroad Company, or the representatives of its title and interest, and the continued and uninterrupted operation of such branch, in connection with and as part of said main line, are essential to the due preservation of the security of said bondholders.

And your orator further showeth that there still remains outstanding and in full force and effect mortgage bonds to the amount of three hundred and thirty-four thousand dollars, besides interest, parcel of the sectional mortgage bonds referred to in the said mortgage to your orator and said John R. Gardner, and which were intended to be provided for and taken up out of the proceeds of bonds issued under that mortgage, which constituted liens prior and paramount to the lien of the before-mentioned mortgage held by your orator, as surviving trustee, upon sections or portions of said railroad covered by the said mortgage held by your orator, and these outstanding sectional bonds,
16 or at least the great proportion thereof, and the mortgage or mortgages whereby the same are secured, are so conditioned that if the semi-annual interest falling due thereon is suffered at any time to remain in arrear and default for ninety days, the principal of such bonds is liable to become presently due and payable at the option of the holder of such bonds, although the term originally fixed for the payment of such principal is yet far distant. That on the first day of January, eighteen hundred and seventy-seven, the semi-annual interest fell due upon three hundred and thirty-four thousand dollars, or thereabouts, of these outstanding sectional mortgage bonds, which have the special condition last above stated; that said railroad company wholly made default in such interest, and the same remains in arrear and unpaid; that if, by reason of ninety days' continuance of such default, the principal of said bonds should be suffered to become due, the security of the bondholders for whom your orator is trustee would be very seriously jeoparded and prejudiced, and great and irreparable loss and prejudice would also result therefrom to the
17 said railroad company and its other creditors and all parties

in interest other than said prior sectional bondholders. And your orator further showeth that besides the mortgage and secured debts hereinbefore particularly set forth, the said company has a large unsecured floating debt, the amount whereof, according to the best information which your orator has been able to obtain, and as he verily believes, is about five hundred and forty-seven thousand dollars, and besides this, the said company is indebted upon so-called coupon notes to the amount of five hundred thousand dollars falling due in the month of April, eighteen hundred and seventy-seven, which are collaterally secured by a deposit in trust of so-called second mortgage bonds of said railroad company to the amount of one million of dollars, which are subsequent in date to the said mortgage held by your orator as trustee.

And your orator further showeth that according to his best knowledge and information, after diligent and careful inquiry, and as he verily believes to be true, there are included in the unsecured floating debt of said railroad company, hereinbefore referred to, the following-named sums of indebtedness and of the descriptions following—
18 that is to say, the said company's notes or bills payable to about the amount of two hundred thousand dollars; arrears of wages to employees, commonly called pay-rolls, to about the amount of eighty-four thousand dollars; obligations of said company, commonly called fare bills, purporting to be receivable in payment of freights and passenger fares due to the company, amounting to about seventy thousand dollars; arrears of dividends due upon guaranteed stock, for which said company is liable to suit and recovery of judgment as upon a debt, amounting to about one hundred and thirty-two thousand dollars, besides a large amount of other indebtedness in the shape of bills for supplies, open accounts, and otherwise.

And your orator further showeth that said company possesses at present but a small amount of cash funds or other available means, and cannot or could not expect to and will not possess in the near future any considerable addition to its cash means or resources other than such net income as it might be able to obtain from the operation of its railroad over and above the expenses of maintaining and operat-
19 ing its railroad, and such cash and other available means at present and for the immediate future are necessarily and will be wholly insufficient to enable it to meet its pecuniary obligations and continue its business, and said railroad company is in a state of great pecuniary embarrassment.

That it is essential to the security of the bondholders for whom your orator is trustee as aforesaid, and to the maintenance of their rights and interests, and also greatly to the general interest of the other bona fide creditors of said company, whether secured or unsecured, and to the interest of all legitimately concerned in the premises, that the before-mentioned line of the said Atlantic and Gulf Railroad, including the several branches hereinbefore mentioned, which have been accustomed to be and are now being used and operated in connection with said main line as aforesaid, should continue to be maintained, used, and operated as one entire railroad enterprise, as hitherto, and that interruption or dislocation of the freight or passenger business thereof should be at all permitted to occur, and if any such interruption were permitted there would be serious danger of consequent diversion of the currents of business into other channels, with lasting effect,
20 and the value of the said railroad, with its appurtenances, so mortgaged to your orator, as trustee for said bondholders se-

cured thereby, be seriously interfered with, prejudiced, and deteriorated, to the great and irreparable loss and damage of the said bondholders for whom your orator is trustee, as well as to the great jeopardy and loss of the other bona fide creditors and the'r interests legitimately involved; and thereby also the income of said railroad, which by said mortgage is also hypothecated to your orator as trustee for said bondholders, would be greatly impaired and deteriorated, to the great and irreparable loss and damage of your orator and the other bondholders for whom he is trustee; and to the end aforesaid, and for the protection and preservation of the rights and interests of your orator as trustee, and of the bondholders in whose behalf he is trustee, it is likewise and especially essential that such measures should seasonably be taken as may avoid the falling due and consequent enforcement of payment of the principal of the said prior sectional mortgage bonds to the amount of three hundred and thirty-four thousand dollars, and likewise such measures as may avoid giving occasion t› the
21 State of Georgia to enter upon and take possession of the said branch line from Thomasville to Albany as a consequence of default in the interest upon the said bonds for six hundred and sixty-four thousand dollars, being the paramount lien upon that branch.

And your orator further showeth that, in consequence of the default made by said railroad company in the payment of its mortgage interest as aforesaid, in connection with its pecuniary condition in other respects, the credit of said company has become broken down; that a large amount of said unsecured floating debt is already past due, and the residue will be rapidly and constantly falling due, and it is and will be impossible for said company to maintain its credit or longer to carry along successfully such floating unsecured debt.

That by laws and usages in the State of Georgia the sums due and owing, and from time to time becoming due and owing, to said railroad company for freights and earnings of its railroad accumulating in the hands of parties with whom it has connection, or otherwise outstanding as debts due and owing to said company, are and will be from time to time liable to seizure upon garnishment or attachment by parties
22 holding unsecured floating debts against said company who may choose to commence suit for recovery thereof, thus depriving the company of the cash means absolutely necessary in order to pay current expenses and continue the operation of its road; that not only the freights and earnings, but also the tangible personal property of said company, when in the State of Florida or elsewhere out of Georgia in the necessary course of carrying on the company's transportation business, are and will be likewise subject to seizure and attachment by floating-debt creditors who may choose to commence suits or legal proceedings for recovery of their claims, and that under the existing circumstances the said railroad company cannot safely or successfully operate its road and carry on its transportation and other business, and that it is essential to the security and to the protection and preservation of the rights and interests of the bondholders for whom your orator is trustee, as well as for the general interests of the other bona fide creditors of said company and of all others legitimately concerned in the premises, that without delay a receiver or receivers should be appointed by this court of all and singular the railroad of the said The Atlantic
23 and Gulf Railroad Company, including the several branches thereof, aforesaid with the appurtenances and rolling-stock and equipments thereof, and the rents, issues, profits, tolls, and income of said railroad and branches and all the other property, rights, and in-

terests mentioned in the said mortgage or deed of trust held by your *order* as surviving trustee as aforesaid, and that said railroad company should be ordered and directed to assign, transfer, and deliver over all and singular the same to such receiver or receivers, to be had and holden subject to the order of this court in the premises, to the end and purpose that the said railroad and branches may be continued to be used, run, and operated, and the income thereof to be received by such receiver or receivers without disturbance or interruption, and that the nett income accruing therefrom while under such receivership may be applied and disposed of by the order and under the direction of this court for the protection and preservation of the said property and in such manner as shall be expedient for the interest of those concerned and agreeable to the legal and equitable rights of your orator and the bondholders for whom he is trustee and of all
24 parties legitimately concerned or interested in the premises.

To the end, therefore, that the said defendant, The Atlantic and Gulf Railroad Company, may answer upon oath, according to the course and practice of this court, all and singular the premises, and that, as your orator now prays, by the order of this court and pending this suit, a receiver or receivers may be appointed of all and singular the before-mentioned railroad of the Atlantic and Gulf Railroad Company extending from Savannah to Bainbridge, and the said branches thereof extending respectively from Dupont to Live Oak, and from Thomasville to Albany, and from the depot in the city of Savannah to the wharves on the Savannah River, including said wharves, and the said branch called the junction, connecting the main line with the Savannah and Charleston Railroad, and the appurtenances and equipments or rolling-stock of said railroad and branches respectively, and the rents, issues, profits, tolls, and income of all and singular said railroad and branches, and all other the properties, rights, and interests mentioned in and purporting to be conveyed or covered by the said mortgage or deed of trust executed to your orator and said John R.
25 Gardner as trustees, to be had and holden by said receiver or receivers subject to the order of this court in the premises, and with such orders or directions to the said receiver or receivers from time to time in relation to the maintenance and management and operation of said railroad and branches and the application of the income and earnings thereof and the management and disposition of all the property involved in such receivership as to the court may seem fit and agreeable to equity, and that the said defendant, The Atlantic and Gulf Railroad Company, may be ordered and compelled to assign and transfer in proper and effectual form to the said receiver or receivers all the property, rights, interests, and things embraced in such receivership, and that an account may be taken of the amount due and owing upon the outstanding bonds which are entitled to the benefit of the security of the said mortgage held by your orator as surviving trustee as aforesaid, and that the said The Atlantic and Gulf Railroad Company may be adjudged and decreed by some short day, to be fixed for the purpose, to pay the same, and that in default of such payment the said The Atlantic and Gulf Railroad Company, and all persons claiming under it subsequently to the
26 commencement of this suit, may be barred and foreclosed from all equity of redemption and right, title, and interest in or to the said railroad and branches, with the appurtenances and franchises and rolling-stock or equipment thereof, and all other the properties, rights, and things embraced in or covered by the said mortgage or deed of

trust held by your orator as surviving trustee as aforesaid, and that all and singular the same may be sold under and according to the decree and under the direction of this court, and that from the net proceeds of such sale there be paid the amount of principal and interest due or owing upon or secured by the outstanding bonds which are entitled to the benefit of the security of the said mortgage or deed of trust held by your orator as surviving trustee, together with the costs and expenses of this suit and your orator's commission or compensation as trustee; and that your orator may have such further or such other order, decree, or relief in the premises as may be agreeable to law and equity.

May it please your honors to grant unto your orator the writ of subpœna, issuing out of and under the seal of this court, directed to the said defendant, The Atlantic and Gulf Railroad Com-
27 pany, commanding it to be and appear in this court, according to the course and practice thereof, then and there to answer all and singular the premises, and to stand to, abide by and perform such order and decree in the premises as may be agreeable to law and equity.

And your orator will ever pray, &c.

(Signed) MORRIS K. JESUP.

(Signed) W. S. CHISHOLM,
Comp'l't's Solicitor.

(Signed) EVARTS, SOUTHMAYD & CHOATE, *of New York,*
Compl't's Solicitors, & of Counsel.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Morris K. Jesup, the complainant in the foregoing bill named, being duly sworn, deposeth and saith that he has read the said foregoing bill of complaint by him subscribed, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters he believes the same to be true; and further saith not.

(Signed) MORRIS K. JESUP.

Subscribed and sworn before me, at the city of New York, this 8th day of January, 1877.

[SEAL.] (Signed) EDWARD L. OWEN
U. S. Commissioner for Southern Distr't of New York.

28 *Schedule marked A, referred to in the foregoing bill of complaint.*

This indenture, made the twentieth day of December, in the year one thousand eight hundred sixty-seven, between The Atlantic and Gulf Railroad Company, a corporation created by or under the laws of the State of Georgia, and formed by the consolidation of two other railroad corporations formerly known, the one as the Atlantic and Gulf Railroad Company, and the other as the Savannah, Albany and Gulf Railroad Company, under and by virtue of an act of the general assembly of the State of Georgia, entitled "An act to authorize the consolidation of the stock of the Savannah, Albany and Gulf Railroad Company and the Atlantic and Gulf Railroad Company, and for other purposes," passed April 18th, 1863, party of the first part, and John R. Gardner and Morris K. Jesup, both of the city of New York, trustees, parties of the second part.

Whereas the party of the first part has heretofore issued bonds for the sum of one million five hundred thousand dollars, and has
29 secured the same by mortgages upon different sections of its railroad.

And whereas it is desirous of consolidating its mortgage indebtedness, and of raising money to complete its railroad to the State line, and for those purposes desires to borrow the sum of two millions of dollars, and, to secure the payment of said sum of two millions of dollars, to execute, issue, and deliver one thousand five hundred bonds or writings obligatory, each for the sum of one thousand dollars, and one thousand bonds, each for the sum of five hundred dollars; the bonds for one thousand dollars being numbered from one to one thousand five hundred, both inclusive, and the bonds for five hundred dollars being numbered from fifteen hundred and one to twenty-five hundred, both numbers inclusive; all dated the twentieth day of December, eighteen hundred and sixty-seven, bearing interest at the rate of seven per cent. per annum, free of government tax, from the first day of July, one thousand eight hundred and sixty-seven, payable semi-annually, on the first days of January and July in each year, at the agency of said company in the city of New York, or at their office in the city of Savannah,
30 and the principal thereof payable at the said office or agency in the city of New York, or in the city of Savannah, on the first day of July, one thousand eight hundred and ninety-seven; all of said bonds to stand equally secured by these presents, and are all of like tenor and in form following, except as to amounts:

No. .] UNITED STATES OF AMERICA. [$500.

STATE OF GEORGIA.

Atlantic and Gulf Railroad Company.—Consolidated mortgage bond.

Know all men by these presents that the Atlantic and Gulf Railroad Company is indebted to John R. Gardner and Morris K. Jesup, of the city of New York, or bearer, in the sum of five hundred dollars, lawful money of the United States of America, which the said company promises to pay to the said John R. Gardner and Morris K. Jesup, or to the bearer hereof, on the first of July, one thousand eight hundred and ninety-seven, at the office or agency of said corporation in the city of New York, or in the city of Savannah, at the option of the holder, with interest thereon from the first day of July, one thousand eight hundred and sixty-seven, at the rate of seven per centum per annum, payable semi-annually, free of government tax, imposed or to be imposed, at
31 the said office or agency in the city of New York, or in the city of Savannah, on the first days of January and July in each year, on presentation and surrender of the annexed coupons as they severally become due.

This bond is one of a series amounting in the aggregate to two millions of dollars, and consisting of one thousand five hundred bonds, each of which is for one thousand dollars, numbered from one to one thousand five hundred, inclusive; and one thousand bonds, each of which is for five hundred dollars, and numbered from fifteen hundred and one to twenty-five hundred, both numbers inclusive, and all of which are of like tenor and date, and the payment of which is secured by a mortgage dated the twentieth day of December, one thousand eight hundred and sixty-seven, made and executed by the Atlantic and Gulf Railroad Company to John R. Gardner and Morris K. Jesup as trustees. And it is agreed by said company that this obligation, and all rights and benefits arising therefrom, may be transferred by general or special endorsement or by delivery. And it is further agreed by the

said company with each successive holder of this bond that, in case of any default in the payment thereof, the said company will waive,
32 and hereby waives, the benefit of any extension, stay, or appraisement laws now existing or which may hereafter exist.

This bond shall not become obligatory until it shall have been authenticated by a certificate endorsed hereon and duly signed by the trustees.

In witness whereof the said Atlantic and Gulf Railroad Company has caused its common seal to be hereto affixed, and the same to be subscribed by its president and secretary on the twentieth day of December, one thousand eight hundred and sixty-seven.

, *Pres't.*

, *Sec't'y.*

We hereby certify that the above bond is secured by a mortgage dated the twentieth day of December, one thousand eight hundred and sixty-seven, on the railroad property and franchises of the Atlantic and Gulf Railroad Company, executed by the said company to us, John R. Gardner and Morris K. Jesup, as trustees, and that this bond is one of one thousand, of five hundred dollars each, all *are* even tenor and date. And we further certify that there are attached to the mortgage securing this bond internal revenue stamps to the amount of two thousand dollars, being the full amount on two millions of dollars of bonds secured thereby.

(Signed) JOHN R. GARDNER,
MORRIS K. JESUP,
Trustees.

33 STATE OF GEORGIA.

ATLANTIC AND GULF RAILROAD COMPANY.

No. .

There is due to the bearer seventeen $\frac{50}{100}$ dollars, being the interest for six months on bond for five hundred dollars due the first day of , payable at the company's office or agency in Savannah or New York, at the option of the holder. $17\frac{50}{100}$.

Treasurer.

Now, therefore, this indenture witnesseth that the said party of the first part, the better to secure the payment of the said bonds, with interest, at the times and in the manner therein mentioned and set forth, and for and in consideration of one dollar by the parties of the second part in hand paid to the party of the first part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, conveyed, transferred, and set over, and by these presents doth grant, bargain, sell, convey, transfer, and set over to the said parties of the second part, and the survivor of them and his and their successors and assigns forever, all and singular the following property of the party of the first part in the State of Georgia, viz: all its railroad, constructed or to be constructed, from the city of Savannah to Bainbridge or to and from any
34 other points in the State of Georgia, with its superstructure, tracks, rails, rolling-stock, bridges, viaducts, culverts, fences, and all other appurtenances, together with all rights of way now ac-

quired or obtained, or hereafter to be acquired or obtained, by the said party of the first part, and including all depots, engine houses, car-houses, station-houses, and other structures, the lots, pieces, or parcels of ground on which the same are or may be erected, and all the pieces of land which shall be used for depots or station purposes, with the appurtenances; also all locomotives, tenders, cars, and other rolling-stock or equipment, and all machinery, tools, implements, fuel, and material acquired or to be hereafter acquired for the constructing, operating, repairing, or replacing the said railroad, or any part thereof, or any of its equipment or appurtenances, and including also all franchises, rights, and privileges of the said party of the first part connected with or relating to said railroad or the construction, maintenance, or use thereof, but nothing herein contained shall be construed as including any lands of the company not necessary to be retained for the railway depot grounds, stations, shops, engine-houses, car-houses, not required for the construction or convenient use of the road. Also a certain indenture of lease, dated November 19th, 1867, between the
35 Pensacola and Georgia Railroad of the first part and the Atlantic and Gulf Railroad of the other part, and the interest of the said Atlantic and Gulf Railroad Company therein and in and to the said property and railroad therein described, together with all and singular the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining, and the revision and reversions, remainders, tolls, incomes, rents, issues, and profits therefrom; and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well at law as in equity, of the said party of the first part of, in, and to the same and any and every part thereof, with the appurtenances, to have and to hold the said premises and every part thereof unto the said parties of the second part and the survivor of them, and their or his heirs, successors, and assigns forever, upon the following trusts, that is to say:

First. In case default shall be made in the payment of the interest on any of the said bonds, according to the tenor *or* of the coupons thereto annexed, or in the payment of any principal of any of the said bonds when the same shall become due and be demanded, and if any such default shall continue for the period of sixty days, or in
36 case of any default in any requirement hereof to be done or kept by the Atlantic and Gulf Railroad Company, and if any such default shall continue for the period of sixty days, then and in either case the said John R. Gardner and Morris K. Jesup, or the survivor of them, or their or his successors in the trusts created or declared by this indenture, personally or by their or his attorneys or agents, may, or upon requisition of the holders of a majority of the lands secured hereby shall be enter into and upon all and singular the premises hereby conveyed or intended so to be, and each and every part thereof, and have, hold, and use the same operating by their or his superintendents, managers, receivers, or servants, or other attorneys or agents, the said railroad, and conducting the business thereof and exercising the franchises pertaining thereto, and making from time to time all repairs and replacements and such useful alterations, additions, and improvements thereto as may seem to them or him judicious, and collecting and receiving all tolls, freights, incomes, rents, issues, and profits of the same and every part thereof, and after deducting the expenses of operating the said railroad and conducting its business and of all the said repairs, replacements, alterations, additions, and improvements and all payments which may be made for

taxes, assessments, charges, or liens prior to the lien of these
37 presents upon the said premises or any part thereof, as well as just compensation for their or his own services, and for the services of such attorneys or counsel as may have been by them or him employed, shall apply the moneys arising as aforesaid to the payment of interest on the bonds secured hereby in the order in which such interest shall have become due or shall become due, rateably to the persons holding the coupons evidencing the right to such interest, and after paying all interest which shall have become due, to apply the said moneys to the payment of the principal of the bonds secured hereby, rateably to the persons holding said bonds, and after the payment of the principal of all the bonds secured hereby, if any surplus shall remain, to pay over the said surplus to the party of the first part or dispose of the same as any court of competent jurisdiction may order.

And the party of the first part hereby covenants and agrees that upon default, as herein specified, it will, immediately upon demand made, deliver, surrender, and give up to the parties of the second part, or the survivor of them, or their or his successors, the premises and property hereby conveyed and transferred, or intended to be,
38 and permit the said trustees to operate and maintain said railroad and the appurtenances.

Second. In case any default shall be made as hereinbefore defined, and shall continue as hereinbefore specified, then, and in any such case, the said John R. Gardner and Morris K. Jesup, or the survivor of them, or their or his successor or successors in the trust created or declared by this indenture, may, or upon requisition of the holders of a majority of the bonds secured hereby, shall, after entry as aforesaid, or other entry, or without entry, personally, or by their or his attorneys or agents, sell and dispose of all and singular the premises hereby conveyed, or intended so to be, at public auction, in the city of New York, or at such place within the State of Georgia as the trustees, or the survivor of them, or their or his successor, may designate, and at such time as they or he may appoint, having first given notice of the time and place of such sale by advertisement, published not less than three times a week for six weeks, in one or more newspapers in each of the cities of New York and Savannah, or to adjourn the said sale from time
39 to time in their or his discretion, and if so adjourning to make the same without further notice at the time and place to which the same may be so adjourned, and to make or deliver to the purchasers thereof good and sufficient deed or deeds in the law for the same in fee simple; which sale, made as aforesaid, and whether subject to the said lien or otherwise, shall be a perpetual bar, both in law and equity, against the parties to these presents and all other persons lawfully claiming or to claim the said premises, or any part thereof, by, from, through, or under them, or any or either of them; and after deducting from the proceeds of such sale just allowances for all expenses thereof, including attorney's and cou'sel fees, and all other expenses, advances, or liabilities which may have been made or incurred by the said trustees in operating or maintaining the said railroad, or in managing the business while in their or his possession, and in arranging for and completing the sale thereof, and all payments which may have been made by them or him for taxes or assessments, and charges and liens prior to the lien of these presents, on the said premises, or any part
40 thereof, as well as compensation for their or his own services, apply the said proceeds to the payment of interest on the bonds secured hereby in the order in which such interest shall have become,

or shall become, due rateably to the persons holding the coupons evidencing the right to such interest; and after paying all interest that shall have become due to apply the said proceeds of the sale to the payment of the principal of the bonds secured hereby rateably to the persons hold' said bonds; and after the payment of the principal of all the bonds secured hereby, if any surplus remains, to pay over the said surplus to the party of the first part, or dispose of the same as any court of competent jurisdiction may direct.

And it is hereby declared that the receipt or receipts of the said trustees shall be a sufficient discharge to the purchaser or purchasers of said premises for his or their purchase money, and such purchaser or purchasers, his or their heirs, executors, or administrators, shall not, after payment thereof, and having such receip's, be liable to see to its being applied upon or for the trusts and purposes of these pres-
41 ents, or in any way whatever be answerable for any loss misapplication or non-application of such purchase money, or any part thereof, or be obliged to inquire into the necessity, expediency, or authority for any such sale.

Third. That in case of any default, as hereinbefore defined, the said trustees may adopt any legal or equitable method for foreclosing this mortgage and enforcing the trusts herein contained, or for collecting the principal and interest of the bonds secured hereby.

Fourth. The trustees shall have full power in their discretion, upon the written request of the company, to convey, by way of release or otherwise, to the persons designated by the said company, any lands acquired or held for the purposes of stations, depots, shops, or other buildings, and shall also have power to convey as aforesaid, on like request, any lands or property which, in the judgment of the trustees, shall not be necessary for use in connection with the said railroad or which may have been held for a supply of fuel, gravel, on other
42 material, and also to convey as aforesaid, on like request, any lands not occupied by the track which may become desired by reason of a change of the location of any station-house, depot, shop, or other building connected with the said railroad, and such lands occupied by the track and adjacent to such station, depot, shop, or other buildings, as the said company may deem it expedient to disuse or abandon by reason of such change, and to consent to any such change and to such other changes, with location of the track or depot or other buildings as in their judgment shall have become expedient, and to make and deliver the conveyances necessary to carry the same into effect, but any lands which may be acquired for permanent use in substitution for any so released, shall be conveyed to the trustees upon the trusts of these presents, and the proceeds of all lands released as aforesaid, which shall not be applied in purchase of others in substitution, shall be paid over to the trustees, to be by them applied to the purchase of bonds of the said company in open market, and the trustees shall also have full power to allow the said company from
43 to time to dispose of according to their discretion such portions of the equipments, machinery, and implements at any time held or acquired for the use of the said railroad as may have become unfit for such use, replacing the same by new, which shall be conveyed to the trustees or be otherwise made subject to the provisions, conditions, limitations, trusts, powers, covenants, agreements, and provisions reserved or contained in this indenture, or granted, declared, or created thereby.

Fifth. Upon a default in the payment of the interest or principal of

the bonds hereby secured, or in the performance of any of the covenants herein contained, upon a requisition in writing, signed by a holder or holders of a majority of the said bonds, and a proper indemnification by the said holders to the trustees against the costs and expenses to be by them incurred, it shall be the duty of the trustees to enforce the rights of the bondholders under these presents by entry, sale, or suit or suits in equity, or at law, as they, being advised by counsel learned in the law, shall deem most expedient for the interest of
44 all holders of said bonds. It is mutually agreed by and between the parties hereto that the word "trustees" as used in these presents shall be construed to mean the trustees for the time being, whether both or either be original or new, and whenever a vacancy shall exist to mean the surviving or continuing trustee, and such trustee shall, during such vacancy, be competent to exercise all the powers by these presents reserved or granted to the parties of the second part.

And it is mutually agreed by and between the parties hereto that neither of the said trustees shall be in any manner responsible for any default or misconduct of the other; that the said trustees shall be entitled to just compensation for all services which they may hereafter render in their trust, to be paid by the said company, or out of the income of the property, and for that purpose may at any time apply to the courts without notice to any person but the said Atlantic and Gulf Railroad Company; that either of said trustees, or any successor, may resign and discharge himself of the trust created by these presents by notice
45 in writing to the said company and to the existing trustee, if there be such, three months before such resignation shall take effect, or such shorter time as they may accept as adequate notice, and upon due execution of the conveyances hereinafter required; that the said trustees, or either of them, may be removed by a vote of a majority in interest of the holders of the aforesaid bonds, the said vote being had at a meeting duly held of the said bondholders, and attested by an instrument under the hands of the persons so voting; that in case at any time hereafter either of the said trustees, or any trustee hereafter appointed, shall die or resign, or be removed, as herein provided, or by a court of competent jurisdiction, or shall become incapable or unfit to act in the said trust, a successor to such trustee shall be appointed by the survivor or continuing trustee, with the consent of the holders for the time being of a majority in interest of the said bonds then outstanding; and the trustee so appointed, with the trustee so surviving or continuing, shall thereupon be vested with all the
46 powers, authorities, and estates reserved by, granted to, or conferred upon the parties of the second part by these presents, and all the rights and interests requisite to enable them to execute the purposes of this trust without any further assurance or conveyance so far as such effect may be lawful, but the surviving or continuing trustee and the party of the first part shall execute all such conveyances and other instruments as the counsel of said trustees may reasonably advise for the purpose of *as*serving the legal estate in the premises jointly with said surviving trustee to the trustee so appointed, and upon the death, resignation, or removal of any trustee, or any appointment in his place in pursuance of these presents, all his powers and authorities by virtue hereof shall cease, and all the estate, right, title, and interest in the said premises of any trustee so dying, resigning, or being removed shall wholly cease and determine; but the said trustee so resigning or being removed shall, on the written request of the new trustee who may be appointed, immediately execute a deed or deeds

ceiver or receivers, according to the prayer of said bill, came on to be heard in pursuance of notice duly served, and was argued by counsel for complainant and by counsel for defendant; and thereupon, consideration thereof, it was ordered, adjudged, and decreed as follows, to wit:

1. That John Screven, of the city of Savannah, and State of Georgia, and Samuel A. Strang, of the city and State of New York, be, and they are hereby, appointed receivers of the entire property and effects embraced in this trust deed or mortgage, set forth in complainant's bill, that is to say, all and singular the railroad of the said The Atlantic and Gulf Railroad Company, extending from Savannah to Bainbridge, and the said branches thereof, extending respectively from Du-
54 pont to Live Oak, in the State of Florida, and from Thomasville to Albany, and from the depot on the city of Savannah to the wharves on the Savannah River, including said wharves, and the *and the* said branch called the Junction Railroad connecting the main line with the Savannah and Charleston Railroad, together with all the franchises, lands, buildings, machinery, rolling-stock, materials, and other property, real and personal, wherever situated and in whatsoever manner held, of said railroad and branches respectively, and the rents, issues, profits, tolls, and income of all and singular said railroad and branches and all other the properties, rights, interests, and franchises mentioned in and purporting to be conveyed or covered by the said trust deed or mortgage executed to the said Morris K. Jesup and John R. Gardner, and to the survivor of them as trustees; and that the same be reduced to actual possessions by the said receivers as soon as may be.

2. To the end that said receivers may be clothed for the time being with complete title, legal and equitable, the said company, as well as the said surviving trustee, Morris K. Jesup, named in the bill, be, and they are hereby, required to execute jointly or severally an assignment or assignments, conveying all said property and effects to said receivers or to be held by them subject to the order and disposition of this court in this suit, which assignment or assignments the said company
55 and the said surviving trustee are hereby ordered and directed to deliver, properly executed, to said receivers or to some duly constituted agent on demand.

3. That said receivers, until further ordered, shall manage and keep in operation the*y* said railway and branches, and shall continue to operate the same as an efficient line of transportation and travel, and to make settlements with and payments to other lines of transportation and travel in the usual course of such business, and employ for that purpose all necessary agents and servants of every kind, receive and collect all the debts and assets due the said corporation, receive and collect all the earnings and income, pay off all current expenses arising after they take control, and settle all legal and just claims for damages or injuries to persons or property sustained under their management; and that they hold subject to further order any surplus money coming to their hands.

4. That proper vouchers be taken and kept in all cases for expenditures and disbursements, and that a full and detailed reports of each month's transaction be filed in the clerk's office within ten days after the close of the month.

5. And the said receivers are hereby authorized to continue the employment of the counsel engaged in defending and prosecuting the causes now pending in the various court' of law or of equity in
56 which the said Atlantic and Gulf Railroad is either plaintiff, complainant, or defendant. And the said receivers are further

authorized to employ counsel and attorneys as they may deem necessary to manage such suits as may hereafter arise, and to give advice to such receivers in relation to the performance of their duties herein, provided the said last-named counsel or attorneys shall not, at the time of such service, be engaged as the counsel or attorneys of either the complainant or the defendant in this cause.

6. In case of the death or removal or failure of either of said receivers to qualify by giving the bond provided for in this order, all the duties prescribed in this order for both shall be performed by the remaining receiver until the further order of the court; and neither one of said receivers shall be held responsible for the acts, misconduct, or default of the other.

7. That the rights, powers, and authority of each receiver shall take effect as soon as a bond in the sum of seventy-five thousand dollars, with not less than two sureties, who (the said sureties) must justify before a United States commissioner or the clerk of this court, shall be filed by each of said receivers in the clerk's office, the bonds to be respectively approved by said clerk, and to be for the faithful performance of the receiver's duties and for a faithful accounting for all money and property coming to his hands.

JOHN ERSKINE,
U. S. Judge.

Feb'y 19, 1877.

57 In the fifth circuit court of the United States for the southern district of Georgia.

MORRIS K. JESUP, COMPLAINANT,
and
THE ATLANTIC AND GULF RAILROAD COMPANY, defendant. } In equity.

Order confirming receivers.

This cause, in respect to the application for the appointment of a receiver or receivers, according to the prayer of the original and supplemental bills, and the petition of the said receivers already appointed, came on to be further heard in open court this twentieth day of April, eighteen hundred and seventy-seven, and during the April term of said court; and upon hearing Mr. W. S. Chisholm, solicitor and counsel for the complainant, and Mr. Robert Falligant, solicitor and counsel for the defendant, The Atlantic and Gulf Railroad Company, and Mr. A. R. Lawton, solicitor and counsel for the receivers, it is now ordered by this court that the appointment of John Screven, of the city of Savannah, in the State of Georgia, and Samuel A. Strang, of the city and State of New York, as receivers of all and singular the property and effects of the said defendant embraced in the said trust deed or mortgage attached as an exhibit to complainant's original bill, and which said appointment was made by this court, at chambers, on the
58 nineteenth day of February, 1877, be, and the same is hereby, confirmed and continued, except as hereinafter modified.

And it is further ordered that the said receivers shall continue, pending this litigation, and until the further order of this court, to hold, use, run, and operate the said railroad and branches and their appurtenances, and exercise the franchise pertaining thereto for the common carriage of freights and passengers, keeping the premises and property, both real and personal, in good condition and repair, to the end that

said road may be operated efficiently and with safety to the public; and shall collect and receive all tolls, freights, incomes, rents, issues, and profits; that they, as such receivers, have authority to employ, pay, and discharge from time to time, in their discretion, all needful laborers, servants, agents, attorneys, and counsel, to purchase and pay for all needful supplies, to settle and adjust with other roads all traffic balances in the usual course of business, to make from time to time, in their best discretion, all needful and proper traffic arrangements with other roads and common carriers for the interchange of business, to pay all lawful taxes upon the property whereof they are appointed receivers that may be due and payable, or become due and payable during the receivership; to prosecute and defend, without the further order of this court, if they shall deem it expedient and for the in-
59 terest of their trust, all existing actions by or against said company, and to pay all expenses and fees incident thereto, and to defend all actions that may be hereafter brought against said company, or against themselves, as such receivers, and to pay the expenses and fees of such prosecution and defense, and also to pay the expenses and disbursements of the complainant trustee, and the fees, expenses, and disbursements of his counsel and solicitor in and about the appointment of the said receivers, and also the expenses and disbursements of the defendant, and the fees, expenses, and disbursements of its counsel and solicitors in and about the said appointment of said receivers; to use the name of the said company in the prosecution of all such actions as they may find it proper, in their discretion, to bring, maintain, or defend; to do whatever may be needful and proper to maintain the corporate organization and franchises of the company until the further order of this court, and to pay and expend such sums and no more for the protection of said corporate organization and franchises as may be hereafter, upon application and hearing, ordered by this court.

And for the purpose last aforesaid, upon the petition of the said receivers, it is ordered that they, or either of them, be authorized to pay and take up the coupons of the first mortgage bonds of the South Georgia and Florida Railroad Company guaranteed by the State
60 of Georgia, which will fall due on the first day of May, A. D. eighteen hundred and seventy-seven, and also to pay any past due coupons of said first mortgage bonds which remain unpaid, where there is no question as to the title of the holder or the validity of the coupon, the entire issue of said first mortgage bonds being four hundred and sixty-four thousand dollars.

And it is further ordered, for the purposes aforesaid, that the said receivers be authorized to pay the coupons for interest on the second mortgage bonds of said South Georgia and Florida Railroad Company, the entire issue being two hundred thousand dollars, which coupons fall due May the first, eighteen hundred and seventy-seven, and also to pay any past due coupons of said second mortgage bonds, where there is no question as to the title of holder or the validity of the coupon, provided that the suit instituted in the court by the trustees under said second mortgage bonds against the complainant Morris K. Jesup, trustee as aforesaid, the said defendant The Atlantic and Gulf Railroad company, and others, be discontinued or otherwise disposed of in the interest of the bill filed by the said complainant, or of the said defendant The Atlantic and Gulf Railroad Company.

And it is further ordered that the said receivers be also author-
61 ized to pay the coupons or interest on the bonds mentioned in said original and supplemental bills, commonly known as sec-

tional bonds, which will become due on the first day of July, eighteen hundred and seventy-seven, the entire issue of said bonds still outstanding being three hundred and thirty-four thousand dollars, and also to pay any past due coupons of said sectional bonds, where there is no question as to the title of the holder or the validity of the coupon.

And it is further ordered that should the said receivers not be in funds at the dates when said coupons for interest shall fall due, or when said past due coupons shall be presented, that they, or either of them, be authorized to issue certificates of indebtedness as receivers or receiver, and to borrow money on the same for such an amount of the said interest as will be in excess of the funds then in his or their hands as receiver or receivers.

And it is further ordered that the said receivers shall keep a separate account of the *of the* tolls, freight, and income derived from the said Junction Branch Railroad, and from said separate fund pay the interest or coupons upon the said bonds issued for the construction of said Junction Branch Railroad at the days and times upon which the same shall become respectively due.

It is further order d that the said receivers, or either of them,
62 be authorized to deposit in any chartered bank in the city of Savannah such funds as have already or may hereafter come into their hands, or the hands of either of them, as receivers, and to draw the same out by their check or checks, or by the check or checks of their duly authorized agent or attorney.

And it is further ordered that the time for the filing of the statement of each month's transactions be extended from ten to twenty-five days after the first of each month.

And it is further ordered that either of the parties to this suit, upon notice in writing to the other party and to the said receivers, or the said receivers upon notice to the parties to this suit, may, at any time, and from time to time, apply to the court for further orders or directions in relation to the said receivership, or the administration thereof, or affecting the subject-matters embraced therein, provided that such notice shall be served at least ten days previous to the application, unless shorter notice be in writing accepted, which notice shall be served, either personally upon the parties to be notified or served upon their solicitors in accordance with the practice of this court.

And it is further ordered and declared that the making of this order, or the a'quies'ence of the said The Atlantic and Gulf Railroad Company in the making thereof, shall not be deemed to preclude the said rail-
63 road company from setting up any defense it might otherwise make against the foreclosure of the mortgage held by the complainant as surviving trustee, which is in the bill set forth and supplemental bill, or the sale of the said mortgaged premises thereunder, or against the final decree or relief prayed by the complainant's bill and supplemented bill, or any part thereof, nor in anywise prejudice the said railroad company in respect of any such defence which it might otherwise make upon the final hearing or trial of this suit upon the *the* merits.

JOHN ERSKINE,
U. S. Judge.

Filed Ap'l 20, 1877. W. F. Warner, deputy clerk.

And afterwards, to wit, on the twentieth day of April, A. D. 1877, the following proceedings were had, to wit:

64 *Supplemental bill.*

In the fifth circuit court of the United States for the southern district of Georgia. In equity.

To the honorable the judges of the fifth circuit of the United States for the southern district of Georgia:

Humbly complaining showeth unto your honors your orator, Morris K. Jesup, who avers himself to be a citizen of the State of New York, surviving trustee, as hereinafter mentioned, that your orator on the day of , 1877, exhibited his original bill of complaint in this honorable court against the Atlantic and Gulf Railroad Company, whom your orator avers is a citizen of the State of Georgia, and has its principal place of business within said southern district, which said original bill alleged and averred—

"That your orator is a citizen of the State of New York, and that the said defendant, The Atlantic and Gulf Railroad Company is a
65 railroad corporation created by and organized and existing under the laws of the State of Georgia, and having its principal office and place of business within the southern district of Georgia. That on or about the twentieth day of December, eighteen hundred and sixty-seven, the said The Atlantic and Gulf Railroad Company, being thereunto duly authorised and empowered by and under its charter and the laws of the State of Georgia, and being the owner and possessor of certain railroad in said State, extending from the city of Savannah to Bainbridge, in said State of Georgia, a distance of about two hundred and thirty-seven miles, and a branch thereof running from Dupont on the main line to the State line between Georgia and Florida, and there connecting the leased line hereinafter mentioned, together with the appurtenances of said main line and branch, and the rolling-stock or equipments thereunto belonging, and also the leasehold interest in a certain other railroad extending from the State line between Georgia and Florida to
66 Live Oak in the State of Florida, a distance of sixteen miles, or thereabouts, with the appurtenances and equipments thereof, held by the said Atlantic and Gulf Railroad Company under lease from the Pensacola and Georgia Railroad Company, and also the other things embraced in and purporting to be covered by the mortgage deed hereinafter mentioned, duly made and executed under the corporate seal of the said The Atlantic and Gulf Railroad Company, with the signatures of its president and secretary attesting the same, and delivered unto your orator and one John R. Gardner, then residing in the city of New York, and a citizen of the State of New York, and now deceased, its certain indenture of mortgage or deed of trust to your orator and said Jno. R. Gardner as trustees, bearing date on said twentieth day of December, eighteen hundred and sixty-seven, whereby the said The Atlantic and Gulf Railroad Company conveyed in mortgage unto your orator and said John R. Gardner, and the survivor of them, and
67 his and their successors and assigns forever, the aforesaid railroad owned and possessed by said company, extending from Savannah to Bainbridge with the aforementioned branch from Dupont to the State line, together with the appurtenances and rolling-stock and equipments thereof respectively, and its said leasehold interest in the said railroad extending from the State line to Live Oak, with the appurtenances and equipments thereof, together with the income, tolls, rents, issues, and profits of both said railroads, and the franchises, rights

and privileges belonging or appertaining to the same respectively, and the other things embraced and purporting to be convyed by said mortgage or deed of trust to be had and holden by your orator and the said John R. Gardner, and the survivor of them, and or his heirs, successors, or assigns forever, in trust, to secure the principal and interest of certain bonds then proposed to be issued and negotiated by said railroad company to the aggregate amount of two millions of dollars,
68 in bonds for one thousand dollars and for five hundred dollars each, all dated December twentieth, eighteen hundred and sixty-seven, bearing interest at the rate of seven per cent. per annum from July 1st, 1867, payable semi-annually on the first days of January and July of each year at the agency of said railroad company in the city of New York, or at their office in the city of Savannah, at the option of the holder, and the principal payment on the first day of July, eighteen hundred and ninety-seven," (a copy of which said indenture of mortgage or deed of trust is to said original bill annexed in a schedule marked A, and is made a part of said bill.)

And your orator further showeth that said original bill further alleged "that the execution of the said indenture of mortgage or deed of trust by the said The Atlantic and Gulf Railroad Company was afterwards duly acknowledged and authenticated according to the laws of the State of Georgia, so as to entitle the same to be recorded, and the said indenture of mortgage or deed of trust was afterwards duly re-
69 corded in accordance with the laws of the State of Georgia."

And your orator further showeth that said original bill also alleged "that the said John R. Gardner died in or about the month of December, eighte n hundred and seventy-one, and no successor of the said John R. Gardner in the trusteeship created by or under said indenture of mortgage or deed of trust has been ever appointed, and your orator, as the sole surviving trustee, is now vested with the entire estate, and with the trusts, rights, and powers under said indenture, which were originally invested in him and in the said John R. Gardner."

And your orator further showeth that said original bill further alleged "that after the execution of the above indenture of mortgage or deed of trust the said The Atlantic and Gulf Railroad Company duly made, executed, and issued, and negotiated and transferred, for full and valuable consideration by said railroad company received therefor, the bonds of the description and form and tenor in said indenture of
70 mortgage provided for and recited, and intended and purporting to be thereby secured, to the aggregate amount of two millions of dollars in said indenture provided for, conforming to the recital and specifications of said indenture in that behalf, accompanied by the certificate of your orator and said Gardner, as trustees, and with coupons for the interest thereon annexed thereto in the form provided for in said indenture, excepting only the bonds to the aggregate amount of three hundred and thirty-four thousand dollars remain unissued and have been reserved from issue and negotiation because a corresponding amount of the prior sectional mortgage bonds, having liens upon particular sections of the said railroad, and which were designed to be provided for by means of so-called consolidated bonds issued under the said mortgage to your orator and said John R. Gardner, have not been as yet taken up, but still remains outstanding, and have prior liens upon the respective portions of the said railroad covered thereby, but that the remainder of the said bonds issued under and
71 secured by the said mortgage or deed of trust to your orator and said John R. Gardner—that is to say, such bonds to the aggre-

gate amount of sixteen hundred and sixty-six thousand dollars of principal now remain outstanding, and in full force and effect in the hands of the respective parties to whom the same have been duly negotiated, and who are the owners and holders thereof, for value, and the holders of said bonds, who are very numerous, and your orator, as surviving trustee, as aforesaid, in their behalf, are entitled to the benefit of the security provided by said mortgage or deed of trust."

And your orator further showeth that said original bill further alleged "that the said The Atlantic and Gulf Railroad Company has made default in the performance of the conditions and stipulations contained in the said indenture of mortgage or deed of trust, and in the said bonds for sixteen hundred and sixty-six thousand dollars, issued thereunder and secured thereby, and now outstanding, as aforesaid."

72 And your orator further showeth that the said original bill also alleged "that the said railroad company wholly failed to pay, or to make any provision for the payment of, either at said company's office or agency in the city of New York, or in the city of Savannah, or elsewhere or otherwise however, the six months' interest on the said outstanding bonds for sixteen hundred and sixty-six thousand dollars, which became due and payable on the first day of January, eighteen hundred and seventy-seven, but has admitted and announced its inability to pay such interest; that on the second day of January, eighteen hundred and seventy-seven, the first day of January being a legal holiday in New York, the interest coupons falling due on the said first day of January upon a large amount of the said outstanding bonds for sixteen hundred and sixty-six thousand dollars, issued under and secured by said mortgage or deed of trust, were duly presented for payment at the said company's office or agency in the city of New York, and

73 payment thereof was duly demanded, and such payment was refused for want of funds, and the said interest coupons remain wholly unpaid and in default. And that the amount of interest now in arrear and unpaid upon the said outstanding bonds for sixteen hundred and sixty-six thousand dollars, issued under and secured by said mortgage or deed of trust, is fifty-eight thousand and three hundred and ten dollars; and by reason of such default made in the conditions of said mortgage or deed of trust it has become your orator's duty, as trustee, to enforce the security of said mortgage or deed of trust upon the property and franchises embraced in and covered by said mortgage or deed of trust, for the benefit and security of said bondholders, for whom your orator is trustee."

And your orator further sheweth that the said original bill also alleged, "that after the execution of the said mortgage or deed of trust to your orator and the said John R. Gardner the said The

74 Atlantic and Gulf Railroad Company purchased and became the owner of, and they still own, the railroad, with its appurtenances, extending from the State line, between Georgia and Florida to Live Oak, in the State of Florida, a distance of about sixteen miles' which had been leased to the said The Atlantic and Gulf Railroad Company by the Pensacola and Georgia Railroad Company by the indenture of lease, dated November nineteenth, 1867, which leased was embraced in and covered by said indenture of mortgage or deed of trust to your orator and said John R. Gardner, and such railroad line in Florida, between the State line and Live Oak, has been and is used and operated, together with the branch of the said Atlantic and Gulf Railroad Company situate in the State of Georgia, extending from Dupont, on the main line of the Atlantic and Gulf Railroad,

a distance of thirty-two miles or thereabouts, to the point of connection on the State line, between Georgia and Florida, and there
75 is thus formed and has been and is being operated by the said The Atlantic and Gulf Railroad Company a continuous line of railroad, about forty miles in length, extending from Dupont, in Georgia, to Live Oak, in Florida, running as a branch of and in connection with the main line of the Atlantic and Gulf Railroad between Savannah and Bainbridge, and the freight and passenger business of said branch line to Live Oak as thus connected forms a very important and valuable portion of the through freight and passenger business of the said Atlantic and Gulf Railroad, having as well a local business, and constitutes an important portion of the security of the bondholders, for whom your orator is trustee, as aforesaid."

And your orator further sheweth that said original bill further alleged, "that, in addition to the before-mentioned line from Savannah to Bainbridge and the said branch from Dupont to Live Oak, the
76 said The Atlantic and Gulf Railroad Company also possesses, owns, and operates in connection with and as part of its said railroad the following-described other lines of railroad situate in the said State of Georgia; that is to say, a branch of its railroad, about fifty-eight miles in length, extending from Thomasville, on the main line between Savannah and Bainbridge, to Albany, in the county of , in said State of Georgia, which said branch formerly belonged to the South Georgia and Florida Railroad Company, and is subject to a lien of the State of Georgia created before said road became the property of the Atlantic and Gulf Railroad Company, and which paramount to its title for the principal and interest of certain bonds to the amount of six hundred and sixty-four thousand dollars or thereabouts, and likewise two short branches used in connection with and as part of said main line, viz, one of about two miles in length extending from the depot in the city of Savannah to the wharves on the Savannah
77 River, including such wharves, this branch being subject to a purchase-money mortgage of fifty thousand dollars or thereabouts."

And your orator further sheweth that the said original bill further alleged, "that the before mentioned and paramount lien from Thomasville to Albany for six hundred and sixty-four thousand dollars, with interest, or thereabouts, is accompanied by a right of the State of Georgia to enter upon and take possession of the said line of said railroad, with its appurtenances, in case of default being made in the due payment of the interest upon such bonds as it falls due; that such interest is payable semi-annually, and a semi-annual installment upon said bonds, or upon a large portion thereof, will fall due on the first day of May next.

That the said branch line between Albany and Thomasville is a very important and valuable portion of the railroad line of the said Atlantic and Gulf Railroad Company, and constitutes, by its business, a large and important portion of the through freight and passenger busi-
78 ness of the said main line, which would be liable to be diverted to another line of transportation in case the said branch line to Albany should pass out of the control of the Atlantic and Gulf Railroad Company, or the representatives of its title and interests; and such branch line, with its connections, and the business flowing to the main line therefrom, constitutes a very important and valuable portion of the security of the bondholders for whom your orator is trustee, and the maintenance of said branch under the control of said Atlantic and Gulf

Railroad Company, or the representatives of its title and interests, and the continued and uninterrupted operation of such branch in connection with, and as a part of, said main line are essential to the due preservation of the security of said bondholders."

And your orator further showeth that said original bill further alleged "that there still remain outstanding, and in full force and effect,
mortgage bonds to the amount of three hundred and thirty-four
79 thousand dollars, besides interest, parcel of the sectional mortgage bonds referred to in the said mortgage to your orator and said John R. Gardner, and which were intended to be provided for and taken up out of the proceeds of bonds issued under that mortgage, which constituted liens prior and paramount to the lien of the beforementioned mortgage, held by your orator as surviving trustee, upon sections or portions of the said railroad covered by the said mortgage held by your orator; and that these outstanding sectional bonds, or at least the great proportion thereof, and the mortgage or mortgages whereby the same are secured, are so conditioned that if the semi-annual interest falling due thereon is suffered at any time to remain in arrear and default for ninety days the principal of said bonds is liable to become presently due and payable, at the option of the holders of said bonds, although the term originally fixed for the payment of such principal is
yet far distant. That on the first day of January, eighteen hun-
80 dred and seventy, the semi-annual interest fell due upon three hundred and thirty-four thousand dollars or thereabouts of these outstanding sectional mortgage bonds, which have the special condition last above stated; that said railroad company wholly made default in such interest, and the same remains in arrear and unpaid; that if by reason of ninety days' continuance of such default the principal of such bonds should be suffered to become due, the security of the bondholders for whom your orator is trustee would be very seriously jeoparded and prejudiced, and great and irreparable loss and prejudice would also result therefrom to the said railroad company and its other creditors and all parties in interest other than said prior sectional bondholders."

And your orator further showeth that said original bill also alleged "that besides the mortgage and secured debts hereinbefore particularly set forth the said company has a large unsecured floating debt,
the amount whereof, according to the best information which your
81 orator has been able to obtain and as he verily believes, is about five hundred and forty-seven thousand dollars; and besides this the said company is indebted upon so-called coupon notes to the amount of five hundred thousand dollars, falling due in the month of April, eighteen hundred and seventy-seven, which are collaterally secured by a deposit in trust of so-called second mortgage bonds of said railroad company to the amount of one million of dollars, which are subject in date to the said mortgage held by your orator as trustee."

And your orator futher showeth that the said original bill also alleged "that, according to the best knowledge and information, after diligent and careful inquiry, and as he verily believes to be true, there are included in the unsecured floating debt of said railroad company hereinbefore referred to the following named sums of indebtedness, and of the description following, that is to say, the said company's notes or bills payable to about the amount of two hundred thousand dollars; arrears
of wages to employees, commonly called pay-rolls, to about the
82 amount of eighty-four thousand dollars obligations of said company, commonly called fare bills, purporting to be receivable in

payment of freights and passenger fares due to the company, amounting to about seventy thousand dollars; arrears of dividends due on guaranteed stock, for which said company is liable to suit and recovery of judgment as upon a debt, amounting to about one hundred and thirty-two thousand dollars, besides a large amount of other indebtedness in the shape of bills for supplies, open accounts, and otherwise."

And your orator further showeth that said original further alleged "that said company possesses at present but a small amount of cash funds or other available means, and cannot or could not expect to and will not possess in the near future any considerable addition to its cash means or resources, other than such net income as it might be able to obtain from the operation of its railroad over and above the expenses of maintaining and operating its railroad, and such cash
83 and other available means at present and for the immediate future are necessarily and will be wholly insufficient to enable it to meet its pecuniary obligations and continue its business, and said railroad is in a state of great pecuniary embarrassment. That it is essential to the security of the bondholders for whom your orator is trustee as aforesaid, and to the maintenance of their rights and interests, and also greatly to the general interest of the other bona fide creditors of said company, whether secured or unsecured, and to the interest of all legitimately concerned in the premises, that the before-mentioned line of the said Atlantic and Gulf Railroad, including the several branches, as hereinbefore mentioned, which have been accustomed to be and are now being used and operated in connection with said main line as aforesaid, should continue to be maintained, used, and operated as one entire railroad enterprise, as hitherto, and that no interruption or dislocation of the freights or passenger business thereof should be at all permitted to occur, and if any such interruption was permitted
84 there would be serious danger of consequent diversion of the currents of business into other channels with lasting effect, and the value of the said railroad, with its appurtenances so mortgaged to your orator as trustee for said bondholders secured thereby, be seriously interferred with, prejudiced, and deteroriated, to the great and irreparable loss and damage of the said bondholders for whom your orator is trustee, as well as to the great jeopardy and loss of the other bona fide creditors and other interests legitimately involved, and thereby also the income of said railroad, which by the said mortgage is also hypothecated to your orator as trustee for said bondholders, would be greatly impaired and deteriorated, to the great and irreparable loss and damage of your orator and the bondholders for whom he is trustee, and to the end aforesaid and for the protection and preservation of the rights and interests of your orator as trustee and of the bondholders in whose behalf he is trustee, it is likewise and especially essential that such means
85 should be seasonably taken as may avoid the falling due and consequent enforcement of payment of the principal of the said prior sectional mortgage bonds to the amount of 334,000 and likewise such measures as may avoid giving occasion to the State of Georgia to enter upon and take possession of the branch line from Thomasville to Albany, as a consequence of default in the interest upon the said bonds for six hundred and sixty-four thousand dollars, being the paramount lien upon that branch."

And your orator further showeth that said original bill further alleged "that, in consequence of the default made by said railroad company in the payment of its mortgage interest as aforesaid, in connection with its pecuniary condition in other respects, the credit of the

said company has become broken down; that a large amount of said unsecured floating debts is already past due, and the residue will
86 be rapidly and constantly falling due, and it is and will be impossible for said company to maintain its credit or longer carry along successfully such floating unsecured debt.

"That by the laws and usages in the State of Georgia the sums due and owing and from time to time becoming due and owing to said railroad company for the freights and earnings of its railroad and accumulating in the hands of parties with whom it has connection, or otherwise outstanding as debts due and owing to said company, are and will be from time to time liable to seizure upon garnishment or attachment by parties holding unsecured floating debts against said company who may choose to commence suit for the recovery thereof, thus depriving the company of the cash means absolutely necessary in order to pay current expenses and continue the operation of the road; that not the freights and earnings, but also the tangible personal property of said company *wherein* the State of Florida or elsewhere out of Georgia, in the necessary course of carrying on the company's transpor-
87 tation business, are and will be subject to seizure and attachment by floating debt creditors who may choose to commence suit or legal proceedings for recovery of their claims, and that under the existing circumstances the said railroad company cannot safely or successfully operate its road and carry on its transportation and other business, and that it is essential to the security and to the protection and preservation of the rights and interests of the bondholders for whom your orator is trustee as well as for the general interest of the other bona fide creditors of said company and of all others legitimately concerned in the premises, that without delay a receiver or receivers should be appointed by this court of all and singular the railroad of the said The Atlantic and Gulf Railroad Company, including the several branches thereof aforesaid, with the appurtenances and rolling-stock and equipments thereof, and the rents, issues, profits, tolls, and income of said railroad and branches and all the other property, rights, and interest mentioned in the said mortgage or deed of trust held by your ora-
88 tor as surviving trustee as aforesaid, and that the said railroad company should be ordered and directed to assign, transfer, and deliver over all and singular the same to such receiver or receivers, to be had and holden subject to the order of this court in the premises, to the end and purpose that the said railroad and branches may be continued to be used, run, and operated and the income thereof to be received by such receiver or receivers without disturbance or interruption, and that the net income accruing therefrom while under such receivership may be applied and disposed of by the order and under the direction of this court for the protection and preservation of the said property and in such manner as shall be expedient for the interests of those concerned, and agreeable to the legal and equitable rights of your orator and the bondholders for whom he is trustee, and of all parties legitimately concerned or interested in the premises."

And your orator further says that it was by said original bill prayed that to the end, therefore, that the said defendant, The Atlantic
89 and Gulf Railroad Company, may answer on oath, according to the practice and course of the court, all and singular the premises, and that, as your orator now prays, by the order of this court, and pending this suit, a receiver or receivers may be appointed of all and singular the before-mentioned railroad of the Atlantic and Gulf Railroad Company, extending from Savannah to Bainbridge, and the

said branches thereof, extending respectively from Dupont to Live Oak, and from Thomasville to Albany, and from the depot in the city of Savannah to the wharves on the Savannah River, including said wharves and the said branch called the Junction Railroad, connecting the main line with the Savannah and Charleston Railroad, and the appurtenances and equipments or rolling-stock of said railroad or branches respectively, and the rents, issues, profits, tolls, and income of all and singular said railroad and branches, and all other the propertys, rights, and interests mentioned in and purporting to be conveyed or
90 covered by the said mortgage or deed of trust executed to your orator and said John R. Gardner as trustees, to be had and holden by said receiver or receivers subject to the order of this court in the premises, and with such order and directions to said receiver or receivers, from time to time, in relation to the maintenance and management and operation of said railroad and branches, and the application of the income and earnings thereof and the management and disposition of all the property in such receivership, as to the company seem fit and agreeable to equity. And that the said defendant, The Atlantic and Gulf Railroad Company, may be ordered and compelled to assign and transfer, in proper and effectual form, to the said receiver or receivers, all the property, rights, interests, and things embraced in such receivership, and that an account may be taken of the amount due and owing on the outstanding bonds which are entitled to the benefit of the security of the said mortgage held by your orator as surviving trustee as aforesaid, and
91 that the said The Atlantic and Gulf Railroad Company may be adjudged and decreed, by some short day to be fixed for the purpose, to pay the same, and that in default of such payment the said The Atlantic and Gulf Railroad Company, and all persons claiming under it subsequently to the commencement of this suit, may be barred and foreclosed from all equity of redemption and right, title, and interest in or to the said railroad and branches, with appurtenances and franchises and rolling stock or equipments thereof, and all other the properties, rights, and things embraced in or covered by the said mortgage or deed of trust held by your orator as surviving trustee as aforesaid, and that all and singular the same may be sold under and according to the decree and under the direction of this court, and from the net proceeds of such sale there be paid the amount of principal and interest due or owing upon or secured by the outstanding bonds which are entitled to the benefit of the security of the said mortgage or deed of trust held by your orator as sur-
92 viving trustee, together with the costs and expenses of this suit and your orator's commission or compensation as trustee, and that your orator may have such further or such other order, decree, or relief in the premises as may be agreeable to law and equity."

And your orator further showeth that the said defendant, The Atlantic and Gulf Railroad Company, on the day of , 1877, was duly and legally served with proper subpœna in said suit; after which, upon the nineteenth day of February, the foll'ing order and decree was passed by the honorable John Erskine, judge at chambers:

"The cause, in respect to the application for the appointment of a receiver or receivers, according to the prayer of said bill, came on to be heard in pursuance of notice duly served, and was argued by counsel for complainant and by counsel for defendant, and thereupon consideration thereof, it was ordered, adjudged, and decreed as follows, to wit:

"1st. That John Screven, of the city of Savannah, and State
93 of Georgia, and Samuel A. Strang, of the city and State of New York, be, and they are, appointed receivers of the entire property and effects embraced in this trust deed or mortgage, set forth in complainant's bill—that is to say, all and singular the railroad of the said The Atlantic and Gulf Railroad Company, extending from Savannah to Bainbridge, and the said branches thereof, extending respectively from Dupont to Live Oak, in the State of Florida, and from Thomasville to Albany, and from the depot in the city of Savannah to the wharves on the Savannah river, including said wharves, and the said branch called the Junction Railroad, connecting the main line with the Savannah and Charleston Railroad, together with all the franchises, lands, buildings, machinery, rolling-stock, materials, and other property, real and personal, wherever situated and in whatsoever manner held by said railroad and branches respectively; and the rents, issues, profits,
94 tolls, and income of all and singular said railroad and branches, and all other the properties, rights, interest, and franchises mentioned in and purporting to be conveyed or covered by the said trust deed or mortgage executed to the said Morris K. Jesup and John R. Gardner, and to the survivor of them as trustees, and that the same be reduced to actual possession by the said receivers as soon as may be.

"2nd. To the end that the said receivers may be clothed, for the time being, with complete title, legal and equitable, the said company, as well as the said surviving trustee, Morris K. Jesup, named in the bill, be, and they are hereby, required to execute, jointly or severally, an assignment or assignments, conveying all said property and effects to said receivers, to be held by them subject to the order and disposition of this court in this suit, which assignment or assignments the said company and the said surviving trustee are hereby ordered and directed to deliver, properly executed, to said receivers, or to some duly constituted agent on demand.

95 "3d. That said receivers, until further ordered, shall manage and keep in operation the said railroad and branches, and shall continue to operate the same as an efficient line of transportation and travel, and to make settlements with and payments to other lines of transportation and travel in the usual course of such business, and employ for that purpose all necessary agents and servants of every kind, receive and collect all the earnings and incomes, pay off all current expenses arising after they take control, and settle all legal and just claims for damages or injuries to persons or property sustained under their management, and that they hold subject to further order any surplus money coming to their hands.

"4th. That proper vouchers be taken and kept in all cases for expenditures and disbursements, and that a full and detailed report of each month's transactions be filed in the clerk's office within ten days after the close of the months.

"5th. And the said receivers are hereby authorized to continue
96 the employment of the counsel engaged in defending and prosecuting the cause now pending in the various courts of law or of equity, in which the said Atlantic and Gulf Railroad is either plaintiff, complainant, or defendant.

"And the said receivers are further authorized to employ counsel and attorneys, as they may deem necessary, to manage such suits as may hereafter arise, and to give advice to such receivers in relation to the performance of their duties herein provided. The said last-named counsel or attorneys shall not, at the time of such service, be engaged as the

counsel or attorneys of *the* either the complainant or defendant in this cause.

"6th. In the case of the death or removal or failure of either of said receivers to qualify by giving the bond required by this order, all the duties prescribed in this order for both shall be performed by the remaining receiver until the further order of this court, and neither one of said receivers shall be held responsible for the acts, misconduct, or default of the other.

97 "7th. That the rights, powers, and authority of each receiver shall take effect as soon as a bond in the sum of seventy-five thousand dollars, with not less than two sureties, who (the said sureties) must justify before a United States commissioner or the clerk of this court, shall be filed by each of said receivers in the clerk's office, the bonds to be respectively approved by said clerk and to be conditioned for the faithful performance of the receiver's duties and for a faithful accounting for all money and property coming to his hands."

And your orator further showeth that in pursuance of said above-recited order each of said receivers filed his bond for the same, and in conformity with the terms of said order, in the clerk's office of this court, and that said defendant, The Atlantic and Gulf Railroad Company, duly assigned to said receivers all of the property of said Atlantic and Gulf Railroad Company, as mentioned in said order, and which is by said order so directed to assign to them.

98 And your orator further sheweth that on the twenty-seventh day of March, eighteen hundred and seventy-seven, upon the petition of the said receivers for that purpose, the following order was granted by the honorable John Erskine, judge, at chambers, to wit:

"On reading the foregoing petition, and duly considering the facts set forth, it is ordered that the said receivers of The Atlantic and Gulf Rail', John Screven and Samuel A. Strang, be, and are hereby, authorised to pay and take up the past due coupons of bonds of said railroad company secured by the three mortgages known as sectional mortgages, and to use any funds now or hereafter to come into their hands as receivers for that purpose.

"It is further ordered that said receivers be, and are hereby, authorised to purchase and lay down on said railroad five hundred tons of new rails of approved pattern, and to issue the notes or certifi-

99 cates of the receivers to the extent of the purchase money of said rails."

And your orator further showeth that the said defendant, The Atlantic and Gulf Railroad Company, on the second day of April, 1877, being the April rules day of the honorable court, filed its appearance in said suit.

And your orator further showeth, by way of supplement, that it is provided by the terms of the said mortgage or deed of trust, to wit:

First. In case default shall be made in the payment of the interest on any of said bonds according to the tenor thereof, or of the coupons thereto annexed, or in the payment of any principal of any of the said bonds when the same shall become due and be demanded, and if any such default shall continue for the period of sixty days, or in any case of any default in any requirement hereof to be done or kept by The Atlantic and Gulf Railroad, and if any such default shall continue for the

100 period of sixty days, then and in either case the said John R. Gardner and Morris K. Jesup, or the survivor of them, or their or his successors in the trusts created or declared by this indenture, personally, or by their or his attorneys or agents, may, or upon requisition of the holders of a majority of the bonds secured hereby, shall

enter into and upon all and singular the premises hereby conveyed, or intended so to be, and each and every part thereof, and have hold the same, operating by their or his superintendents, managers, receivers, or servants, or their attorneys or agents, the said railroad, and conducting the business thereof, and exercising the franchises pertaining thereto, from time to time, all replacements and such useful alterations, additions, and improvements thereto, as may seem to them or him judicious, and collecting and receiving all tolls, freights, incomes, rents, issues, and profits of the same, and every part thereof, and after
101 deducting the expenses of operating the said railroad and conducting its business, and of all the said repairs, replacements, alterations, additions, and improvements, and all payments which may be made for taxes, assessments, charges, or liens prior to the lien of these presents upon the said premises, or any part thereof, as well as just compensation for their or his own services, and for the services of such attorneys or counsel as may have been by him or them employed, shall apply the moneys arising as aforesaid to the payment of interest on the bonds secured hereby in the order in which such interest shall have become due or shall become due rateably to the persons holding the coupons evidencing the right to such interest, and after paying all interest which shall become due to apply the said moneys to the payment of the principal of the bonds secured hereby rateably to the persons holding said bonds, and after the payment of the principal of the bonds secured hereby, if any surplus shall remain, to pay over the
102 said surplus to the party of the first part, or dispose of the same as any court of competent jurisdiction may order.

And the party of the first part hereby covenants and agrees that upon default as herein specified it will, immediately upon demand made, deliver, surrender, and yield up to the parties of the second part, or the survivor of them, or their or his successors, the premises and property hereby conveyed and transferred, or intended so to be, and permit the said trustees to operate and maintain said railroad and the appurtenances.

Second. In case any default shall be made, as hereinbefore defined, and shall continue as hereinbefore specified, then, and in any such case, the said John R. Gardner and Morris K. Jesup, or the survivor of them, and their or his successors or successor in the trust created or declared by this indenture, may, or upon requisition of the holders of a majority of the bonds secured hereby shall, after entry as aforesaid, or
103 other entry, or without entry, personally, or by his or their attorneys or agents, sell and dispose of all and singular the premises hereby conveyed, or intended so to be, at public auction in the city of New York, or at such place within the State of Georgia as the trustees or survivors of them, or their or his successors may designate, and at such time as they or he may appoint, having first given notice of the time and place of such sale by advertisement published not less than three times a week for six weeks, in one or more newspapers in each of the cities of New York and Savannah, or to adjourn the said sale from time to time in their or his discretion, and if so adjourning, to make the same without further notice, at the time and place to which the same may be so adjourned, and to make or deliver to the purchasers thereof good and sufficient deed or deeds in the law for the same in fee-simple, which sale, made as aforesaid, and whether subject to the
104 said lien, or otherwise, shall be a perpetual bar, both in law and equity, against the parties to these presents, and all other persons lawfully claiming or to claim the said premises, or any part

thereof, by, from, through, or under them, or any or either of them, and after deducting from the proceeds of such sale just allowances for all expenses thereof, including attorneys and counsel fees, and all expenses or liabilities which may have been made or incurred by the said trustees in operating or maintaining the said railroad, or in managing its business while in their or his possession, and in arranging for and completing the sale thereof, and all payments which may have been made by them or him for taxes or assessments, and charges and liens prior to the lien of these presents on the said premises, or any part thereof, as well as compensation for their or his own services, apply the said proceeds to the payment of interest on the bonds secured hereby, in the order in which such interest shall have become, or shall become due, rateably to the persons holding the coupons
105 evidencing the right to such interest. And after paying all interest that shall have become due, to apply the said proceeds of the sale to the payment of the principal of the bonds secured hereby rateably to the persons holding said bonds. And after the payment of the principal of all the bonds secured hereby, if any surplus shall remain, to pay over the said surplus to the party of the first part, or dispose of the same as any court of competent jurisdiction may direct.

And your orator further showeth that the said The Atlantic and Gulf Railroad Company has made default in the performance of the conditions and stipulations contained in the said indenture of mortgage or deed of trust, and in the said bonds for sixteen hundred and sixty-six thousand dollars, issued thereunder and secured thereby and now outstanding as aforesaid. That the said railroad company wholly failed to pay or to make any provision for the payment of, either at
106 said company's office or agency in the city of New York or in the city of Savannah, or elsewhere or otherwise howsoever, the six months' interest on the said outstanding bonds for sixteen hundred and sixty-six thousand dollars, which became due and payable on the first day of January, eighteen hundred and seventy-seven, but has admitted and announced its inability to meet and pay such interest, and that on the second day of January, eighteen hundred and seventy-seven, the first day of January being a legal holiday in New York, the interest coupons falling due on the said first day of January upon a large amount of the said outstanding bonds for sixteen hundred and sixty-six thousand dollars, issued under and secured by said mortgage or deed of trust, were duly presented for payment at the said company's office or agency in the city of New York, and payment thereof was duly demanded, and such payment was refused for want of funds, and the said interest coupons remain wholly unpaid and in default,
107 and that the amount of interest now in arrear and unpaid upon the said outstanding bonds for sixteen hundred and sixty-six thousand dollars, issued under and secured by said mortgage or deed of trust, is fifty-eight thousand and three hundred and ten dollars, and that such default has continued for the period of sixty days and still continues, and by reason of such default made in the conditions of said mortgage, and in the payment of said interest and the continuance of such default for said period of sixty days, it has become your orator's duty to enforce the security of said mortgage or deed of trust upon the property and franchises embraced in and covered by said mortgage or deed of trust for the benefit and security of said bondholders, for whom your orator is trustee.

To the end, therefore, that the said defendant may, if it can, show

why your orator should not have the relief hereby prayed, and may, upon knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to the following interrogatories, that is to say:

108 1st. State in detail the nature and character of all liens mortgages, and demands claimed to be superior in dignity to the said bonds secured by the aforesaid trust deed or mortgage executed to the said Gardner and Jesup and to the survivor of them.

2. Give statement of all the property, both real and personal, which belonged to the said defendant at the time of filing of the said original bill, and the time when and the title by which the same were acquired.

3. Attach copies of the contracts and conveyance in writing by which the defendant acquired title to the South Georgia and Florida Railroad, and the Florida Branch Railroad, and the Junction Railroad.

And further, that the aforesaid appointment of John Screven and Samuel A. Strang as receivers of all and singular the property, rights, tolls, freights, credit, and franchises of the said defendant and its appurtenances be confirmed, and that pending this litigation and

109 until further order of this court, they and each of them shall have, hold, and use the said railroad and its appurtenances, and by their superintendents, managers, servants, attorneys, or agents shall operate the same and conduct the business thereof, and exercise the franchises pertaining, and make from time to time all repairs and replacements and such useful alterations, additions, and improvements thereto as may seem to them or him judicious, and collect and receive all tolls, freights, incomes, rents, issues, and profits of the same, and every part thereof; and after deducting the expenses of operating the said railroad and conducting its business, of all the said repairs, replacements, alterations, additions, and improvements, and all payments which may be made for taxes, assessments, charges, or liens prior to the lien of said bonds and said trust deed or mortgage upon which this bill is filed, upon the said premises or any part thereof, as well as just compensation for their or his own services, and for the services

110 of such attorneys or counsel as may have been by them or him employed, and the costs and expenses of your orator, and the expenses and fees of such counsel as he may have employed, shall apply the moneys arising as aforesaid to the payment of the interest on the said bonds secured by the said trust deed or mortgage to the said Gardner and your orator, and the survivor of them, in the order in which such interest shall have become due, or shall from time to time become due, rateably to the persons holding the coupons evidencing the rights to such interest, and after paying all interest which shall become due to apply the said moneys to the payment of the principal of the said bonds rateably to the persons holding said bonds, and after the payment of the principal of all the said bonds, if any surplus shall remain, to pay over the said surplus to the said defendant or dispose of the same as this honorable court may direct.

111 And, further, that upon the final hearing of this cause, the said receivers, or the survivor of them, or his or their successor or successors, may be ordered and decreed, in the due course of law, to sell and dispose of all and singular the premises *or* conveyed, or intended so to be, to said John R. Gardner and your orator by the aforesaid mortgage or deed of trust, at public auction, at such time and place as this honorable court may designate, having first given notice of said time and place of such sale by advertisement, published as this honorable court may direct, or to adjourn the said sale from time to time, in

their discretion, or the discretion of either of them; and if so adjourning, to make the same without further notice, at the time and place to which the said may be so adjourned; and to make and deliver to the purchasers thereof good and sufficient deed or deeds in the law for the same, which sale, made as aforesaid, and whether subject to the said liens or otherwise, shall be a perpetual bar, both in law and equity, against the parties to said deed of trust or mortgage, and all other
112 persons lawfully claiming or to claim the said premises, or any *any* part thereof, by, from, through, or under them, or any or either of them; and after deducting from the proceeds of such sale just allowances for all expenses thereof, including attorneys' and counsel fees, and all other expenses, allowances, or liabilities which may have been made or incurred by said receivers, or either of them, in operating or maintaining the said railroad, or in managing its business while in their or his possession, and in the payment of the coupons upon the bonds hereinbefore mentioned, and the costs of this proceeding, and in arranging for and completing the sale thereof, and all payments which may have been made by them, or either of them, for taxes or assessments, and charges and liens prior to the lien of the said mortgage or deed of trust on the said premises, or any part thereof, as well as compensation for the services of said receivers and your orator, apply the said proceeds to the payment of interest on the bonds secured by
113 said mortgage or deed of trust in the order in which such interest shall have become due or shall become due rateably to the persons holding the coupons evidencing the right to such interest, and after paying all interest that shall have become due to apply the said proceeds of the sale to the payment of the principal of the bonds secured by said mortgage or deed of trust and rateably to the persons holding said bonds, and after the payment of the principal of all of the said bonds secured by said mortgage or deed of trust, if any surplus shall remain, to pay over the said surplus to the said defendant, or dispose of the same as this honorable court shall direct.

And that your orator may have such further or other order, decree, or relief in the premises as may to law and equity seem agreeable and meet.

May it please your honors to grant unto your orator the writ of subpœna issuing out of and under the seal of this court, directed to the
114 said defendant The Atlantic and Gulf Railroad Company, commanding it to be and appear in this court according to the cause and practice thereof, then and there to answer all and singular the premises, and to stand to and abide by and perform such order and decree in the premises as may be agreeable to equity.

W. S. CHISHOLM,
Sol'r & Counsel for Compl't.

UNITED STATES OF AMERICA,
Southern Dist. of Georgia. ss:

Walter S. Chisholm, solicitor and counsel for the complainant in the foregoing bill named, being duly sworn, deposeth and saith that he has read the said foregoing bill of complaint by him subscribed, and knows the contents thereof; that the same are true of his own knowledge, except as the matters therein stated upon information and belief, and as to those matters he belives the same to be true; and further saith not.

W. S. CHISHOLM.

Sworn to and subscribed before me this 18th April, 1877.

JAS. McPHERSON, *Clerk.*

115 Upon hearing the foregoing bill, and due notice to the other party, leave is granted to file the same as a supplemental bill, to which the said defendant shall demur, plead, or answer on the rules day in June next.

JOHN ERSKINE, *Judge.*

In open court Ap'l 18, 1877.

116 And afterwards, to wit, on the fourth day of February, A. D. 1878, came the said defendant The Atlantic and Gulf Railroad Company, by R. Falligant, esq., its solicitor, and filed its answer in said cause in the words and figures following, to wit:

Answer.

The answer of the Atlantic and Gulf Railroad Company, the defendant in said cause, to the original and supplementary bills of the said complainant:

This defendant, now and at all times hereafter saving and reserving to itself all benefit and advantage of exceptions which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainant's original and supplementary bills contained, for answer thereunto, or to so much and such parts thereof as this defendant is advised is or are material or necessary for it to make answer unto, this defendant, answering, saith that it admits it to be true,
117 as in said complainant's bills alleged, that said complainant is a citizen of and residing in the State of New York, and that he is the sole surviving trustee under the said alleged mortgage or deed of trust, and further that this defendant is a corporation duly incorporated under the laws of Georgia and having its principal office or place of business in the city of Savannah, and in said southern district of Georgia.

And this defendant, further answering, admits that at the date alleged in said complainant's bill the president and secretary of this defendant, acting under the authority of the board of directors of this company, as set forth in a resolution of said board of directors dated December the third, eighteen hundred and sixty-seven, and attached to this answer as Exhibit A, did execute the mortgage or deed of trust in said complainant's bill set forth, and that Exhibit A to said complainant's bill is a correct copy of said mortgage or deed of trust, and this defendant admits that said mortgage or deed of trust was duly delivered to said Morris K. Jesup and John R. Gardner, trustees,
118 and that said trustees accepted and assumed said trust, and this defendant further admits that said mortgage or deed of trust was duly acknowledged, authenticated, and recorded as required by the laws of Georgia.

And this defendant, further answering, admits the death of said co-trustee, John R. Gardner, and that said Morris K. Jesup, as surviving trustee, is now invested with the entire estate and with the powers, rights, and trusts under said indenture which were originally vested in him and the said John R. Gardner as co-trustees, no successor to said John R. Gardner ever having been appointed.

And this defendant, further answering, admits, as in said supplementary bill alleged, that after the execution of said mortgage or deed of trust this defendant executed under its corporate seal bonds of the description, form, and tenor in said mortgage or deed of trust provided for, and recited and intended and purporting to be thereby secured, to the

aggregate amount of two millions of dollars, as in said mort-
119 gage provided for, and issued, negotiated, and transferred, for valuable consideration received by the defendant, said bonds to the amount of one million six hundred and sixty six thousand dollars, with coupons for the interest thereon annexed thereto in form provided for in said mortgage, all of said bonds bearing the certificate of said Morris K. Jesup and John R. Gardner, trustees, as in said mortgage provided, and that bonds originally executed to make up said aggregate of two millions of dollars to the amount of three hundred and thirty-four thousand dollars have been reserved from issue and negotiation because the sectional mortgage bonds to a corresponding amount secured by mortgages on particular sections of the road of this defendant, and having a prior lien to the consolidated mortgage under which said Morris K. Jesup and John R. Gardner were co-trustees, which said sectional bonds were intended to be taken up and provided for by said consolidated mortgage bonds, have not as yet been so
120 taken up, but still remain outstanding and have prior liens upon the respective portions of this defendant's road covered thereby, as follows:

The sum of one hundred and fourteen thousand five hundred dollars ($114,500.00) secured by mortgage to Donald McDonald, trustee, dated January 1st, 1861, upon the section of the main line of this defendant's road, commencing at the terminus of the old Savannah, Albany, and Gulf Railroad Company and running from thence to Thomasville, said mortgage having been originally given to secure an issue of bonds to the amount of five hundred thousand dollars, ($500,000.00), the principal of said bonds being due twenty years after date, with interest payable semi-annually; and the further sum of two hundred and fourteen thousand dollars ($214,000.00) secured by mortgage originally made to John R. Gardner, trustee, but now held by Daniel G. Purse, substituted trustee, dated July 1, 1865, to secure an issue of bonds to the aggregate amount of five hundred thousand dollars ($500,-
121 000.00), with interest, payable semi-annually, and the principal payable on the first day of July, 1885, said mortgage covering the section of the main line of this defendant from the city of Savannah to Screven Station number seven (No. 7).

And this defendant admits that said consolidated mortgage bonds secured by the mortgage or deed of trust of which said complainant is trustee, to the aggregate amount of one million six hundred and sixty-six thousand dollars, are still outstanding in full force and effect and are a valid lien on all the property of this defendant, not only that held at the time of the execution of the said bonds and mortgage, but also upon all property acquired by this defendant since the execution of said consolidated bonds and the mortgage securing the same; but this defendant avers that said consolidated bonds, while covering with their lien all of the future acquired property of this defendant, hold that lien subject to the mortgage hereinafter more particularly set forth and described.

122 And this defendant, further answering, admits having made default in the payment of the interest coupons of said consolidated bonds falling due January 1, 1877, but avers that the said default was, in great measure, caused by the disaster, temporar' in its character, arising from the epidemic of yellow fever in the city of Savannah during the summer and fall of 1876, and this defendant admits that said coupons remained unpaid for several months, aggregating in the amount of fifty-eight thousand three hundred and ten dollars ($58,310.00); and

this defendant further admits that since the railroad and property of this defendant passed into the hands of the receivers appointed by this court in this cause, default has also been made in the coupons of said consolidated bonds to a like amount on the first July, 1877, and again to a like amount on January 1st, 1878; but this defendant alleges that its legitimate net income has been and is fully sufficient to meet the obligations of this defendant prior in lien to said consolidated mort-
123 gage bonds, and leave an ample surplus to rapidly pay off and discharge the past due coupons of said consolidated mortgage bonds, and, in proof of this assertion, this defendant says that said receivers, under the order of this court, in addition to expending large sums of money in the purchase of new iron and equipping and improving said railroad property, have paid up all interest due on said sectional bonds, and also all interest due on the first and second mortgage bonds of the South Georgia and Florida Railroad, as formerly known, but now a part of the property of this defendant by absolute purchase (which said first and second mortgage bonds have a lien upon said portion of this defendant's property prior to the lien of said consolidated mortgage bonds), and have also paid the interest coupons upon said consolidated mortgage bonds, which fell due January 1st, 1877; and this defendant is informed and believes, and therefore avers, that said receivers will soon be able to pay the coupons of the said consolidated bonds which fell due July 1st, 1877, and will rapidly pay
124 off and discharge all the past due interest on the bonds represented by said complainant as trustee.

And this defendant, further answering, says that it consented to the order of this court appointing the said receivers without waiving, but on the other hand reserving, all its defences of every kind against the foreclosure, because it was convinced that if the race of diligence between the unsecured creditors of this defendant was not controlled large and valuable interests would be imperilled, and perhaps needlessly and recklessly sacrificed by the interference with the regular business of the company, and not because this defendant was permanently unable to meet its obligations, and this confident hope and expectation of this defendant has been already realized by the rapid manner in which said receivers, acting under the wise authority and administration of this honorable court, have been able, as aforesaid, to liquidate the past due obligations of this defendant and at the same time expend large sums in improving and rendering more valu-
125 able the security of the said complainant, as trustee as aforesaid.

And this defendant avers and charges that the highest equity forbids the foreclosure of the said mortgage and the sale of the said railroad and property of this defendant under the same, in view of the increasing prosperity of this defendant, because the sale of the property under such circumstances would in all probability entail the entire sacrifice of the common stock of this def ndant, amounting in the aggregate to the sum of three million six hundred and ninety-three thousand two hundred dollars ($3,693,200.00), and the guaranteed stock of this defendant, amounting in the aggregate to , more or less, and the debt of this defendant upon its coupon notes, amounting to the sum of five hundred thousand dollars ($500,000.00), besides interest, and because it would also sacrifice a large debt secured by the personal endorsement of officers of this defendant, who gave their
126 name and credit to maintain the credit of this defendant and to purchase supplies, which largely increased and established the

value of the security of this defendant as a security for said bonds by said complainant represented, said endorse*dorse*ment having been made with the knowledge and approval of said complainant, and because said sale, if so made, would also imperil and doubtless sacrifice a large number of debts due to the employees of this defendant for labor and services done, performed, and rendered, said employees having through all the period of said yellow fever epidemic remained at their posts and sustained the credit and business of this defendant.

And this defendant respectfully submits the meritorious claims of the said employees to the tender considerations of this honorable court, and urges that their labors and services have preserved and enhanced the value of the security held by the said complainant, and that the amount so due them should not be recklessly and wantonly sacrificed.

127 And this defendant, further answering, s ys that the bonds secured by the said mortgage or deed of trust in complainant's bill set forth do not mature until the year , and are not payable by installments ; and, further, that there is no contract upon the face of said bonds or mortgage under which the princípal of said bonds matures and becomes due and payable upon default of interest, and this defendant submits to this honorable court that said complainant has no legal or equitable right to foreclose said mortgage and sell said property of this defendant until the maturity of said indebtedness, but that if said complainant is entitled to any right against this defendant he is only entitled to have the net income of the mortgaged property applied to the payment of the accrued and accruing interest coupons after the payment of prior obligations.

And this defendant, further answering, admits, as in said bill alleged, that at the time of the execution of said mortgage or deed of

128 trust it held that division of the Florida branch, meaning the portion of the branch road of this defendant from Dupont to Live Oak, lying in the State of Florida, by permanent lease from the Pensacola and Georgia Railroad Company, and has continued to hold and operate the same up to the time of the appointment of receivers in this cause; and this defendant files with this its answer copies of all the papers, showing the tenure by which it holds the portion of said branch road lying in the State of Florida between the Florida line and the town of Live Oak, and has marked the same Exhibit B.

And this defendant admits that the freight and passenger business of said branch line from Dupont to Live Oak forms a very important and valuable portion of the through freight and passenger business of said defendant, and the local business of said branch line as well, and that said branch line, with its growing business, constitutes a very important portion of the security of the bondholders represented by complaintant as trustee as aforesaid.

129 And this defendant, further answering, admits that in addition to the before mentioned line from Savannah to Bainbridge, and the said branch line from Dupont to Live Oak, this defendant has acquired by purchase, possesses, owns, and operates as part of its entire railroad property known as the Atlantic and Gulf Railroad the following described other lines of railroad situated in the State of Georgia, namely, the branch running from Thomasville to Albany, about fifty-eight miles (58 m.) in length, which said portion of this defendant's railroad is subject to the lien of said consolidated mortgage represented by said complainant as trustee, but is also subject to the lien of two other mortgages superior in lien to said consolidated mortgage. The mortgages

alluded to are as follows: I. A first mortgage upon said line, dated January 15, 1869, and executed by the South Georgia and Florida Railroad Company to George B. Corbort and Henry W. Ford, trustees, to secure the payment of bonds of said company to the amount
130 of four hundred and si'ty-four thousand dollars ($464,000.00), bearing even date with said mortgage, and payable thirty years after date, with interest-coupons at the rate of seven per cent. per annum, payable semi-annually the first day of May and November in each year. This class of bonds are endorsed by the governor of the State of Georgia, and it appears upon their face that in case of default in the payment of the interest coupons " the governor of the State of Georgia is authorized to seize and take possession of all the property of said railroad company extending from Thomasville, Georgia, to Albany, Georgia, and apply the earnings of said road to the extinguishment of said unpaid bonds or coupons, and may at his discretion, upon continued default in such payment by said company for a period of six months; sell the said railroad and its equipments, or any portion thereof, in such manner and at such time as in his judgment may best subserve the interest of all concerned, the line of railway being
131 about fifty-eight miles, and apply the proceeds to the payment of this and other bonds of said company having an equal and like lien as this bond, together with all interest that may be due unpaid thereon, as he is authorized and directed to do by an act of the general assembly of the State of Georgia, approved by the governor on the 26th of September, 1868."

And this defendant has appended to this answer a copy of said mortgage, and marked the same Exhibit C.

II. A second mortgage upon said line dated September 6th, 1869, executed by said the South Georgia and Florida Railroad Company to George B. Cohort and Henry W. Ford to secure bonds to the amount of two hundred thousand dollars ($200,000.00), with interest, payable semi-annually on the first day of May and November in each year, said bonds bearing even date with said mortgage, and payable thirty years after date, and this defendant has annexed a copy of said second mortgage to this answer and marked the same Exhibit D.
132 And this defendant admits that at the time of filing said bill the interest coupons on said first and second mortgage bonds of said South Georgia and Florida Railroad were approaching maturity, and that said branch line from Thomasville to Albany was and is a very important and valuable portion of the railroad of this defendant, and constitutes a very important and valuable security to the bonds represented by said complainant, because it contributes by its business a large portion of the through freight and passenger business of this defendant which would be liable to be diverted to another line of transportation in case the said branch line from Thomasville to Albany should pass from the control of this defendant or the representatives of its title and interests.

And this defendant, further answering, admits that since the execution of said consolidated mortgage it has constructed two other branch lines, one about two miles in length, running from its depot in
133 Savannah to the wharves of this defendant on the Savannah River, and that the lien of the said consolidated mortgage by its express terms covers said branch line and wharves, but the lien of said consolidated mortgage is nevertheless subject to the prior lien of a purchase-money mortgage upon said wharf property executed by this defendant to John Screven, Thomas F. Screven, and George P. Screven,

dated May 19th, 1874, to secure the payment in installments of fifty thousand dollars; that said mortgage has been foreclosed, and that there is now due upon the same the sum of thirty-six thousand nine hundred and seventy-five dollars ($36,975.00), exclusive of interest; and this defendant has annexed to this answer a copy of said purchase money mortgage and marked the same Exhibit E.

The other of said recently constructed branch roads is about four and one half (4½) miles in length, connecting the main line of this defendant with the line of the Savannah and Charleston Railroad Company, and while the lien of said consolidated mortgage extends over
134 said last-mentioned branch line, it takes and holds that lien subject to the prior lien of a mortgage executed by this defendant upon said branch road to James H. Johnston and Octavus Cohen, trustees, to secure an issue of bonds to the amount of fifty thousand dollars (50,000), said bonds bearing even date with said mortgage, to wit, November 1st, 1875, with interest from date, payable semi-annually on the first day of May and November in each year, at the rate of eight per cent. per annum, all of said bonds being payable in the year eighteen hundred and eighty-one, unless sooner called in for liquidation, paȳed off and discharged, the right to do which by annual allotment in such amounts as this defendant may desire being expressly reserved. And this defendant further says that in pursuance of said reserved rights it has called in, paid off, and discharged bonds of this issue to the amount of twenty-five hundred dollars ($2,500.00), and that there remains outstanding of said bonds the sum of forty-seven
135 thousand five hundred dollars ($47,500.00), and this defendant has appended a copy of said mortgage upon this branch road, known as the "Junction Branch," to this answer, and marks the same Exhibit F.

And this defendant, further answering, admits that there are outstanding of the bonds known as the sectional mortgage bonds of this defendant the aggregate amount of three hundred and thirty-four thousand dollars ($334,000.00), as follows, to wit:

Of the bonds secured by mortgage to Donal MacDonal, trustee, copy of which mortgage is herewith filed as Exhibit G	114,500 00
Of the bonds secured by mortgage to John R. Gardner, of July 1, 1865, D. G. Purse substituted trustee, copy of which mortgage is herewith filed as Exhibit H	214,000 00
Of the bonds secured by mortgage dated July 1, 1867, to John R. Gardner, trustee, upon section from Thomasville to Bainbridge, copy herewith filed as Exhibit I	7,500 00
Making an aggregate of	336,000 00

136 (three hundred and thirty-six thousand) sectional mortgage bonds; but this defendant is informed and believes, and so avers, that two of said sectional mortgage bonds, going to make up the aggregate of $336,000.00, have been already taken up, but a return of the same has not been made so as to enable this defendant to identify the same; which two bonds reduce the aggregate of sectional mortgage bonds outstanding to the sum of three hundred and thirty-four thousand dollars ($334,000.00), as hereinbefore stated.

But this defendant positively avers that there is no past due interest outstanding and unpaid upon either of said so-called sectional mort-

gage bonds, or of said first and second mortgage bonds of the South Georgia and Florida Railroad Company.

And this defendant, further answering, admits that it is indebted upon its certain coupon notes in the sum of five hundred thousand dollars, which said indebtedness is secured by the so-called second
137 mortgage bonds of this defendant to the amount of one million dollars.

And in addition to said indebtedness upon said coupon notes as aforesaid, this admits further debts, as follows:

Bills payable as per Exhibit J	106,427 24
Free bonds, Bainbridge extension	52,500 00
Due bills, being balance outstanding of so-called fare bills	17,427 00
Transient creditors, Exhibit K	128,516 85
Due employees, Exhibit L	103,047 80
Company's bonds guaranteed by city of Savannah	300,000 00
	$707,918 89

amounting in the aggregate to the sum of seven hundred and seven thousand nine hundred and eighteen dollars and eighty-nine cents.

And this defendant admits other claims outstanding and attempted to be assessed against this defendant, to wit:

Judgment in favor of the State of Georgia, exclusive of interest and cost, the cause now pending upon writ of
138 error before the Supreme Court of the United States—taxes	32,764 70
Tax execution for year 1874, pending before supreme court of Georgia	
Tax execution for 1875	
Tax execution for 1876	
And this defendant says that the above makes an aggregate of	

and will be a lien on the property of this defendant in case the right of the State of Georgia to tax the property of this defendant in the manner sought is established by the decision of the Supreme Court of the United States.

And this defendant further admits that there is pending before the United States circuit court of the southern district of Georgia, a certain claim against this defendant for certain iron, the property of this defendant, nominally for the sum of three hundred and fifty thousand dollars ($350,000.00). And this defendant has, with small and inconsiderable exceptions, set out in this foregoing answer all the
139 claims against this defendant except any claims which may exist for the over-due interest on guaranteed stock of this defendant, and this defendant reserves the right to amend this answer so as to set forth in detail, by exhibit or otherwise, any other indebtedness of this defendant or claims against this defendant.

And this defendant files herewith, as Exhibit M, a consolidated statement of the foregoing debts and claims.

And this defendant admits that it is essential for the security of the bondholders represented by the said complainant, and also greatly to the interest of all other bona fide creditors of this defendant, whether secured or unsecured, that the whole of the main line and branches of this defendant's railroad property, as hereinbefore set forth, all of which is covered, as hereinbefore set forth, by the lien of the mortgage

or deed of trust as aforesaid, and constitutes the railroad property of this defendant, shall continue to be operated and maintained as
140 one entire railroad enterprise, and that interruption or dislocation of the freight or passenger business thereof, or of any part thereof, should not be permitted to occur; and that the value of the property of this defendant would be materially impaired by any diversion of the currents of business; and, further, that proper measures should be taken to prevent the maturity of any of said sectional mortgage bonds, according to the terms of the mortgage securing the same, by reason of any default in the interest coupons; and also to avoid giving any occasion to the State of Georgia to enter up and take possession of the branch road from Thomasville to Albany in consequence of the default upon any interest coupons of the four hundred and sixty-four thousand dollars of bonds of the South Georgia and Florida Railroad Company, secured by first mortgage upon said branch, and endorsed by the State of Georgia, as hereinbefore set forth; and that it is equally important that the interest upon the two hundred
141 thousand dollars of second mortgage bonds of said The South Georgia and Florida Railway Company, secured by second mortgage upon said branch, should be promptly paid, to avoid foreclosure of said second mortgage.

And this defendant further admits that in order to carry on the business of this defendant the appointment of a receiver or receivers was essential, as hereinbefore admitted and for the reasons stated.

And this defendant admits that the order of February 19th, 1877, passed at chambers by the Hon. John Erskine, judge of said court, and set forth in said supplemental bill, was acquiesced in by this defendant for the best interest of all concerned, this defendant, however, not waiving thereby, but expressly reserving any and all defences of every kind and description to said foreclosure.

And this defendant further admits that, in pursuance of said
142 order, the said receivers have filed their bonds in the clerk's office of said court, and that this defendant, as commanded by said order, has duly assigned all of its property to said receivers.

And this defendant, further answering, says, in reply to the first interrogatory of said bill, that it has already stated in its foregoing answer the nature and character of all liens, mortgages, and demands claimed to be superior to the lien of the bonds secured by the mortgage or trust deed of which said complainant is trustee as aforesaid, so far as this defendant is at present advised, and that this defendant will make any corrections and amendments which may hereafter become necessary.

And this defendant, further answering, says, in reply to said second interrogatory, that in its foregoing answer it has stated in full the real property of this defendant and the titles by which the same were acquired as fully as this defendant has deemed requisite, but pro-
143 fe ses itself ready to answer more fully in this regard if so required by this honorable court.

And this defendant herewith files full inventories of all its personal property as owned and turned over by it to said John Screven and Samuel A. Strang, receiver, Febr'y 23, 1877, and has marked the same Exhibit N.

And this defendant, in response to said third interrogatory, files herewith copies of contracts and conveyances under which it acquired and holds the title to said South Georgia and Florida Railroad, and has marked the same Exhibits O^1, O^2, O^3, O^4, O^5.

And this defendant, further answering, says that the property of this defendant covered by the lien of said mortgage of which said complainant is trustee has a value far in excess of the whole aggregate of said consolidated bonds, and of all liens prior to theirs, and is a full and ample security for said bonds, and is constantly increasing in value.

144 And this defendant denies all and all manner of unlawful combinations and confederacy, without this that there is any other matter, cause, or thing in said complainant's said bill of complaint contained material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge and belief of this defendant. All which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct; and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf sustained.

R. FALLIGANT,
Sol'r for the Atlantic & Gulf Railroad Company.

In the southern district of Georgia.

Personally appeared John Screven, president of the Atlantic and
145 Gulf Railroad Company, defendant in the foregoing bill, who, having been duly sworn, deposes and says that the facts set forth in the foregoing answer of said The Atlantic and Gulf Railroad Company are true to the best of this deponent's knowledge and belief.

JOHN SCREVEN,
President of the Atlantic & Gulf R. R. Company.

Subscribed and sworn to before this 4th day of February, 1878.
JOHN W. BURROUGHS,
Not. Public, Chatham County, Georgia.

146 Motion to levy fi. fas. by State of Georgia.

And afterwards, on the 3d day of June, A. D. 1879, the following proceedings were had, to wit:

The petition of the State of Georgia respectfully showeth that prior to the date when a receiver had been appointed to take charge of the railroad of said defendant corporation, and all its property, whether real or personal, belonging thereto, or connected therewith, to wit, on the 20th day of February, 1877, your petitioner had issued fi. fas. against said railroad for taxes alleged to be due said estate, the validity of which said taxes was contested by said railroad company, and the issue arising thereon was then pending before the courts of the State, as provided by law. Two of said causes, to wit, those involving its validity of the taxes claimed for the years 1874 and 1875, were taken at the instance of said defendant corporation by writ of error to
147 the Supreme Court of the United States, and at its last term a judgment was rendered by that appellate tribunal fully sustaining the right of your petitioner to the taxes in question. Fi. fas. were also issued by your petitioner against said company for taxes for the years 1876, 1877, & 1878, but as the grounds of defense set up were the same in all, the latter were allowed to rest and to abide the decision of the courts in the two former causes, excepting that the first-named fi. fa. of the latter class, to wit, that for the year 1876, was in the hands of the sheriff of Chatham County, and had been by him levied upon

certain property of said railroad company, before the appointment of a receiver in said cause.

Petitioner prays that it be allowed to establish the facts herein stated by reference to the records and proceedings in this equity cause in this court, and also by its records and proceedings in the State and Supreme courts of the United States, for the purpose, and the
148 purpose alone, of showing, as the State claims, that this honorable court has no jurisdiction under the law, by its process of the appointment of receivers or otherwise, to hinder, delay, or prevent the execution of the process provided by the law of the State for the collection of its revenue. The said State of Georgia, therefore, in obedience to that comity and respect that should govern her courts towards those of another concurrent jurisdiction, and to promote that harmony which should ever prevail between herself, as one of the members of this Union, and the Federal Government, respectfully insists that she cannot be required, in order to obtain her rights in the premises, to become a party complainant or defendant in the litigation now pending before this honorable court, because, as she maintains—

Firstly. This honorable court has no jurisdiction, by the process of injunction or otherwise, to hinder, delay, or prevent the collection of her revenue.

149 Secondly. As the records show that certain of these fi. fas. had been levied by the sheriff in obedience to processes from the State courts, upon which issues had been joined by the defendant corporation, their jurisdiction could not be affected by a suit filed subsequently in the courts of the United States. The appointment of receivers and a sale by the latter jurisdiction would be inoperative, and void.

Thirdly. It is against public policy to require a State in the collection of her revenue to await the slow and tedious processes necessary to determine the numerous issues made in this cause between private litigants.

Wherefore your petitioner prays that this honorable court may pass such an order as may fully protect the rights of the State in the premises; and petitioner, as in duty bound, will ever pray.

ROBT. M. ELY,
Att'y-General.

150 *Comptroller-general's fi. fas., introduced by solicitor for State of Georgia.*

No. 5. Comptroller-general's office.

STATE OF GEORGIA,
Fulton County:

To all and singular the sheriffs and other lawful officers of this State.

You are hereby commanded that of the goods, and chattels, lands, tenements, and franchises of the Atlantic and Gulf Railroad Company, a corporation chartered, and doing business in this State, you cause to be made the sum of $88,754.55 eighty-seven hundred and fifty-four and $\frac{55}{100}$ dollars as its its tax for the year 1875, assessed against it upon a return of property made by the president of said corporation of file in this office, and costs, and that you pay over said sum of money to the comptroller-general of said State, at his office in Atlanta, Georgia, and return thereto this fi. fa. with your actings and doings
151 entered thereon.

Witness, W. L. Goldsmith, comptroller-general of said State, under the seal of said office.

Issued this the 3rd day of November, 1875.

W. L. GOLDSMITH,
Comptroller-General of Georgia.

Sheriff's return.

STATE OF GEORGIA,
Chatham County:

SHERIFF'S OFFICE,
November 15, 1875.

Under and by virtue of the within fi. fa. I have this day levied upon the buildings known as the machine shop, locomotive house, and car shop, situate, lying, and being at the Atlantic and Gulf Railroad depot in the city of Savannah, county and State aforesaid, and will advertise and sell the same, in terms of the law, the property of the defendant.

The return of—

JOHN T. RONAN,
Sheriff C. County, Geo.

May 17, 1876.

Affidavit of illegality, & bond taken

J. T. RONAN,
S. C. Co.

152 (Endorsement:) Filed in office Sept. 1st, 1876. I. D. Collins, C. S. C. Filed in office August 22, 1879. W. M. Heyward, deputy clerk U. S. C. C.

No. 10, fi. fa.—Comptroller-general's office.

STATE OF GEORGIA,
Fulton County:

To all and singular the sheriffs and other lawful officers of this State:

You are hereby commanded that of the goods and chattles, lands, tenements, and franchises of the Atlantic and Gulf Railroad Company, a corporation in this State, you cause to be made the sum of thirty-two thousand seven hundred and sixty-four $\frac{70}{100}$ (32,764.70) dollars as its tax for the year 1874, assessed against it upon a return of its taxable property according to law, and costs, and that you pay over
153 said sum of money to the comptroller-general of said State, at his office, in Atlanta, Georgia, and return thereto this fi. fa. with your actings and doings entered thereon.

Witness, W. L. Goldsmith, comptroller-general of said State, under the seal of said office.

Issued this the 2d day of October, 1874.

W. L. GOLDSMITH,
Comptroller-General of Georgia.

Return.

STATE OF GEORGIA,
Chatham County:

SHERIFF'S OFFICE, *October 6th*, 1874.

Under and by virtue of the within tax fi. fa. I have this day levied

upon lots number 23 & 24, Atlantic ward, city of Savannah, county and State aforesaid, and will sell the said described property on the first Tuesday in November, 1874, before the court-house door in terms of the law.

The return of—

JOHN T. RONAN,
Sheriff C. Co.

154 (Endorsement:) Filed in office, November 30, 1874. I. D. Collins, C. S. C. Filed August 22, 1879. W. M. Heyward, deputy clerk U. S. C. C.

No. 15, fi. fa.—Comptroller-general's office.

STATE OF GEORGIA,
Fulton County:

To all and singular the sheriffs and other lawful officers of this State:

You are hereby commanded that of the goods and chattels, lands, tenements, and franchises of the Atlantic and Gulf Railroad Company, a corporation chartered by and doing business in this State. You cause to be made the sum of ($9,080.31) nine thousand and eighty $\frac{31}{100}$ dollars, as its tax for the year 1876, assessed against it upon a return of property of said corporation in this State, made by John
155 Screven, president of same, to this office according to law, and the further sum of ($818,160.62) eighteen thousand one hundred and sixty $\frac{62}{100}$ dollars as penalty for default in payment of tax for said year, making total sum of ($27,240.93) twenty-seven thousand two hundred and forty $\frac{93}{100}$ dollars, and costs, and that you pay over said sum of money to the comptroller-general of said State, at his office, in Atlanta, Georgia, and return thereto this fi. fa., with your actings and doings entered thereon.

Witness, W. L. Goldsmith, comptroller-general of said State, under the seal of said office.

Issued this the (2d) second day of November, 1876.

W. L. GOLDSMITH,
Comptroller-General of the State of Georgia.

Return.

STATE OF GEORGIA,
Chatham County:

SHERIFF'S OFFICE, *January* 8, 1877.

Under and by virtue of the within fi. fa. I have this day levied
156 upon the following-described property, lots of land in the city of Savannah, county and State aforesaid, and known and designated on the map or plan of said city as lots numbers 23 & 24, 33 & 36, and I will advertise and sell the same in terms of the law, to satisfy said fi. fa.

The return of—

JOHN T. RONAN,
Sheriff C. C., Ga.

(Endorsement:) Filed August 22, 1879. W. M. Heyward, deputy clerk U. S. C. C.

No. 54. fi fa.—Comptroller-general's office.

STATE OF GEORGIA,
Fulton County:

To all and singular the sheriffs and other lawful officers of this State:

You are hereby commanded that of the goods and chattels, lands, tenements, and franchises of the Atlantic and Gulf Railroad, a corporation chartered by and doing business in this State, you cause to
157 be made the sum of nine thousand three hundred and thirty-three $\frac{12}{100}$ dollars, as its tax for the year 1877, assessed against it upon a return of taxable property made by John Screven, assistant receiver of said corporation, to the comptroller-general of said State, as required by law; and the further sum of twenty-seven thousand nine hundred and ninety $\frac{36}{100}$ dollars as a penalty for non-payment of said tax and costs; and that you pay over said sum of money to the comptroller-general of said State, at his office, in Atlanta, Georgia, and return thereto this execution, with your actings and doings entered thereon.

Witness, W. L. Goldsmith, comptroller-general of said State, under his official hand and the seal of said office.

Issued this November second, 1877.

W. L. GOLDSMITH,
Comptroller-General of Georgia.

Return.

158 Property by order and decree of United States court now in the hands of receivers.

The return of—

JOHN ROWNAN,
Sheriff C. C., Ga.

CHATHAM COUNTY, GEORGIA, *November*, 1877.

Endorsement.

Filed August 22, 1879.

W. M. HEYWARD,
Deputy Clerk, U. S. C. C.

No. 123, fi fa.—Comptroller-general's office.

STATE OF GEORGIA,
Fulton County:

To all and singular the sheriffs and other lawful officers of this State:

You are hereby commanded that of the goods and chattels, lands, tenements, and franchises of the Atlantic and Gulf Railroad Company and branches, a corporation chartered and doing business in this State, you cause to be made the sum of seven thousand and seventy-
159 six $\frac{26}{100}$ dollars, as its tax for the year 1878, assessed against it from the returns made by the officers of said railroad company and branches as of May first, 1878; and the further sum of twenty-one thousand two hundred and twenty-eight $\frac{78}{100}$ dollars, the same being a penalty for non-payment of taxes, as per said returns, and due the State of Georgia for the year 1878, and costs; and that you pay over said sum of money to the comptroller-general of said State, at his office in

Atlanta, Georgia, and return thereto this execution, with your actings and doings entered thereon.

Witness, W. L. Goldsmith, comptroller-general of said State, under his official hand and the seal of said office.

Issued this eighteenth day of March, 1879.

W. L. GOLDSMITH,
Comptroller-General of Georgia.

(Endorsement:) Filed August 22, 1879. W. M. Heyward, deputy clerk, U. S. C. C.

160 And afterwards, to wit, on the 6th day of June, A. D. 1879, the following proceedings were had, to wit:

Order denying motion of the State of Georgia.

The State of Georgia having petitioned the court for leave to proceed with certain fi. fas. for taxes, after argument and consideration,

It is ordered and decreed that the said petition of the State of Georgia be denied, and the same is hereby dismissed.

JOSEPH P. BRADLEY, *C. J.*

JUNE 6, 1879.

161 And afterwards, on the 20th day of June, A. D. 1879, the following decree was filed in words and figures, to wit:

Decree.

These causes came on to be further heard together upon the bills and answer in the above-stated causes, and the various interventions filed in the same, and was argued by counsel, and thereupon, upon consideration thereof, it was, on this 6th day of June, 1879, ordered, adjudged, and decreed as follows, to wit:

First. It is adjudged and decreed by this court that the defendant is a railroad corporation duly established under and by the laws of the State of Georgia, with its principal place of business in the city of Savannah, and the southern district of Georgia, and its property consists of the following-described lines of railway, estate, and effects, to wit:

Its main line, running from its depot in the city of Savannah to
162 Bainbridge, a distance of two hundred and thirty-seven (237) miles, more or less; a branch from said depot in the city of Savannah to the Savannah River, a distance of three miles (3), more or less; a branch from Thomasville, on said main line, to Albany, formerly known as the South Georgia and Florida Branch, a distance of fifty-eight (58) miles, more or less; a branch from Dupont, on the said main line, to Live Oak, in the State of Florida, a distance of forty-eight (48) miles, more or less; a branch connecting the said main line with the Savannah and Charleston Railroad, running four miles (4), more or less, together with all side tracks connected with said main line and branches; also the wharves in the jurisdictional limits of the city of Savannah known as the Atlantic and Gulf Railroad wharves, fronting two thousand two hundred feet, more or less, on the Savannah River, and running back from said river a distance of feet, more or less,
163 the depot grounds in the city of Savannah known as the Atlantic and Gulf Railroad depot, containing eighty-two and three-tenths (82.3) acres, more or less; the depot grounds of said company in

Albany; the depot grounds of said company in Thomasville; the depot grounds of said company in Bainbridge; the depot grounds of said company at Live Oak, in the State of Florida, and other depot grounds, lots, and parcels of land and stations along the line of the said railway and branches, together with all and singular the buildings, structures, and improvements thereon, and the machinery, engines, cars, rolling-stock, and materials of various kinds and descriptions, and the privileges, franchises, money, rents, issues, profits, tolls, income, and appurtenances of every kind and description thereto belonging or in anywise appertaining.

Second. It is further declared, adjudged, and decreed that all of said lines and branches, wharfs, depots, stations, ways, franchises, rolling-stock, equipment, and appurtenances constitute the Atlantic
164 and Gulf Railroad; that the whole is operated as an efficient line of mail, freight, and passenger transportation, and would be greatly and irreparably damaged by a dismemberment thereof, and must be sold as an entirety.

Third. It is further declared, and adjudged, and decreed by the court that the following-named mortgages, made to secure the bonds therein described or separate parts or portions of said railway, and appurtenances are good and valid mortgage liens upon the property and estate covered by each respectively, and for the amounts herein decreed to be due upon each respectively, to wit:

1st. The section of said main line commencing at the termination of the old Savannah, Albany, and Gulf Railroad, and running thence to Thomasville, is subject to a mortgage to Donald McDonald, as trustee, made and executed on the first day of January, A. D. 1861, to secure an issue of five hundred thousand dollars ($500,000) of bonds,
165 with interest payable semi-annually, and the principal payable in twenty years from date, and that of these bonds there are outstanding the sum of one hundred and fourteen thousand five hundred dollars ($114,500).

2nd. The section of the said main line from Savannah to Screven or station number seven (7) is subject to a mortgage made and executed on the first day of July, A. D. 1865, originally to John R. Gardner as trustee, but now held by Daniel G. Purse as substituted trustee in place of the said Gardner, since deceased, to secure an issue of five hundred thousand dollars of bonds, with interest, payable semi-annually, and the principal on the first day of July, A. D. 1885, and that of these bonds there are still outstanding the sum of two hundred and fourteen thousand dollars principal.

3rd. The section of the said main line from Thomasville to Bainbridge is subject to a mortgage made and executed on the first day of
166 July, A. D. 1867, originally to John R. Gardner as trustee, but now held as substituted trustee in place of the said Gardner, since deceased, to secure an issue of five hundred thousand dollars of bonds, with interest, payable semi-annually, and the principal payable on the first day of July, A. D. 1887, and of these bonds there are still outstanding the sum of seven thousand five hundred dollars principal.

4th. The section or branch from Thomasville to Albany, formerly known as the South Georgia and Florida Railroad, is subject to a first mortgage made and executed on the fifteenth day of January, A. D. 1869, to George B. Carhart and Henry W. Ford, as trustees, to secure an issue of four hundred and sixty-four thousand dollars of bonds of the said South Georgia and Florida Railroad Company, and endorsed

by the governor of the State of Georgia, with interest thereon, payable on the first days of May and November of each year, and the
167 principal payable thirty years from date; all of these said last-mentioned bonds are still outstanding.

And the said section or branch from Thomasville to Albany is also further subject to another mortgage, made and executed on the sixth day of September, A. D. 1869, to the said George B. Carhart and Henry W. Ford as trustees, to secure an issue of two hundred thousand dollars of bonds of the said South Georgia and Florida Railroad Company, with interest, payable on the first days of May and November of each year, and the principal in thirty years from date; all of these said last-named bonds are still outstanding.

5th. The section or branch known as the Junction Branch Railroad connecting the said main line with the track of the Central Railroad and Banking Company and with the track of the Savannah and Charleston Railroad Company, is subject to a mortgage made and executed on the first day of November, A. D. 1875, to James H. Johnston and Octavus Cohen as trustees, with interest at the rate of
168 eight per cent. per annum, payable on the first days of May and November of each year, and the principal payable on the first day of November, A. D. 1881, unless sooner called in for liquidation; and of these bonds there are still outstanding the sum of forty-seven thousand five hundred dollars ($47,500). There are no defaults in the payment of the interest of any of the aforesaid bonds, and the aforesaid mortgages are and shall remain good and valid incumbrances upon the property described in each respectively, notwithstanding the sale hereinafter decreed; and the receivers will continue, as heretofore, the payment of the interest coupons thereon until relieved by the further order of this court.

Fourth. It is further declared, adjudged, and decreed by the court that the mortgage or deed of trust made and executed to Morris K. Jesup and John R. Gardner on the twentieth day of December, A. D. 1867, and now held by the said Morris K. Jesup as surviving trustee,
169 to secure an issue of two million dollars ($2,000,000) of the bonds of the said Atlantic and Gulf Railroad Company, payable on the first day of July, A. D. 1897, with interest, payable on the first days of January and July of each year, which said bonds are fully set forth and described in the said bill of the said Morris K. Jesup, surviving trustee, is a good and valid mortgage or deed of trust, covering all the property and estate therein mentioned, that is, of the entire estate real, personal, and mixed, of the tolls, rights, income, franchises, and property of every kind and description, acquired and to be acquired, of the Atlantic and Gulf Railroad Company, including the said branch formerly known as the South Georgia and Florida Railroad, and the said branch commonly known as the Junction Branch Railroad, connecting the main line of the said Atlantic and Gulf Railroad with the Savannah and Charleston Railroad.

That of the said last-named bonds there are outstanding and
170 in the hands of bona fide holders the sum of one million six hundred and sixty-six thousand dollars; that upon these last-named bonds there are past due and unpaid the interest coupons payable January the first, A. D. 1879, amounting to fifty-eight thousand three hundred and ten dollars, with interest thereon from that date, and that upon said bonds there will be due the further sum of fifty-eight thousand three hundred dollars, on the first day of July, A. D. 1879, which said sum will draw interest from that date, and that the said Morris K.

Jesup, as surviving trustee as aforesaid, do recover the said sums, together with the interest thereon, due and to be due as aforesaid, for the benefit of the holders of said coupons.

That the said Morris K. Jesup, surviving trustee as aforesaid, and his successors in the said trust, continue to hold the balance of said bonds, to wit, the amount of three hundred and thirty-four thousand dollars thereof for the purpose of raising money to retire the said mort-
171 gage bonds of the various issues amounting originally to one million five hundred thousand dollars, and given upon different sections of the said railroad, and of which said sectional bonds there are now outstanding the sum of three hundred and thirty-six thousand dollars, and continue to consolidate the mortgage indebtedness of the said defendant company, as provided in and by the said mortgage or deed of trust to the said Morris K. Jesup and John R. Gardner, trustees as aforesaid, and that the said mortgage or deed of trust last mentioned is and shall remain a good and valid mortgage or deed of trust, securing the payment of the said bonds and coupons as aforesaid, upon all the property which it has been hereinbefore decreed to cover, with all the powers, covenants, stipulations, and agreements in the same contained, notwithstanding the sale hereinafter decreed, except as to the January, 1879, coupons upon the said one million six hun-
172 dred and sixty-six thousand dollars of bonds, which said coupons, together with the interest thereon, are to be paid out of the proceeds of the sale hereinafter decreed.

Fifth. It is further declared, adjudged, and decreed that the said mortgage or deed of trust made and executed by the said Atlantic and Gulf Railroad on the first day of January, A. D. 1872, to Eugene Kelly and Samuel A. Strang as trustees, to secure an issue of $1,500,000 of bonds, payable on the first day of January, A. D. 1892, with interest free from government tax, imposed or to be imposed, payable on the first days of January and July in each year, is a good and valid mortgage or deed of trust of the property therein mentioned, that is, upon all the constructed railroad of the said Atlantic and Gulf Railroad Company and branches, including the said branch from Thomas-
173 ville to Albany, formerly known as the South Georgia and Florida Railroad, with its superstructure, tracts, viaducts, culverts, fences, depots, wharves, stations, ways, franchises, rolling-stock, equipments, privileges, rents, issues, profits, tolls, income, and property of every kind appurtenant to said railroad and branches; that of said issue of $1,500,000 of bonds there are outstanding and in the hands of bona fide purchasers for value the amount of $1,415,000; that on the first day of July, A. D. 1877, the said defendant failed to pay the interest coupons on said $1,415,000 bonds which were due and payable on that day, amounting to the sum of $49,525, and made default therein, which default still continues; that the said defendant again, on the first days of January and July, A. D. 1878, and January, A. D. 1879, respectively, failed to pay the interest coupons which were due and payable on said last-named bonds on those days, the default
174 made on each of those days amounting to $49,525, which said default still continues; that there will be due on the interest coupons on said last-named bonds, which are payable on the first day of July, A. D. 1879, the further sum of $49,525, and that the said complainants, Eugene Kelly and Samuel A. Strang, as trustees as aforesaid, recover of the said defendant, for the benefit of the holders of said *of said* $1,415,000 of bonds, the said principal of said bonds, and the prin-

cipal of said coupons, with interest on said coupons from the time when each is respectively payable.

And it appearing from the amended answer of the defendant to the bill of said Eugene Kelly and Samuel A. Strang, trustees as aforesaid, that the said defendant disclaims any knowledge as to the title of certain $8,000 of the said $1,415,000 of bonds, any party in interest may move the court to exclude the said 8,000 of bonds
175 which are described in the said amended answer from participation in the proceeds of the sale hereafter decreed, and for such other order or decree concerning the said $8,000 of bonds as may be necessary in the premises.

That $85,000 of the said issue of $1,500,000 of bonds are held by Daniel G. Purse and Edward Lovell as trustees to keep and hold the said bonds as security to indemnify and make whole the holder of the change bills of said defendant outstanding on the fourth day of January, A. D. 1877, upon condition nevertheless that as any amount of said change bills might be cancelled from time to time a like amount of said bonds should be also discharged from the trust aforesaid; that on the fourth day of January, A. D. 1877, there were outstanding of said change bills the sum of $89,000, and that since that date there
176 have been cancelled of said change bills the sum of $73,586, leaving of said change bills now outstanding the sum of $15,414; that of said $85,000 of said bonds there must be cancelled the sum of $73,586, and that the remainder thereof, amounting to $12,500, together with the interest coupons thereon for July, 1877, January and July, 1878, and January and July, 1879, be retained by the said Daniel G. Purse and Edward Lovell, trustees as aforesaid, as collateral security for such of the holders of said change bills as may intervene before the final decree to be rendered in these causes, and that the said Eugene Kelly and Samuel A. Strang, as trustees as aforesaid, recover for the use and benefit of said Daniel G. Purse and Edward Lovell, trustees as aforesaid, the sum of $15,414, to be paid to the holders of said change bills upon surrender of the same pro rata out of the share of the proceeds of the
177 sale hereinafter decreed, to which the said $12,500 of bonds and the aforesaid unpaid coupons thereon held as collateral security for the payment of said uncancelled change bills shall be entitled on a distribution of the proceeds of said sale.

Sixth. It is further declared, adjudged, and decreed that the said defendant is indebted to the State of Georgia for taxes the following amounts, to wit:

For the year 1874,	principal	.....	32,764 71
" " " 1875,	"	.....	8,754 55
" " " 1876,	"	.....	9,080 31
" " " 1877,	"	.....	12,441 16
" " " 1878,	"	.....	7,076 26
Aggregating		.....	70,116 99

And also the principal sum of such tax as may be assessed by the comptroller-general of the State of Georgia for the year 1879; that such taxes are prior to all other liens except judicial costs; that neither penalty nor interest is due on the taxes for any one of the afore-
178 said years; that the said principal sums due for the years 1874, 1875, 1876, 1877, and 1878, and the principal sum to be due for the year 1879, when the same shall be assessed by the comptroller-gen-

eral, shall all be held out of the proceeds of the sale hereinafter decreed, subject to the demand of the State of Georgia.

Seventh. It is ordered, adjudged, and decreed that the defendant, The Atlantic and Gulf Railroad Company, pay into the registry of this court, on or before the first day of August, A. D. 1879, the amount ascertained and hereinbefore declared to be due for principal and interest of said unpaid coupons by the said defendant to the complainants, Morris K. Jesup, as surviving trustee under the trust deed made to him, and John R. Gardner, now deceased, and also the amount hereinbefore decreed to be due for principal of the bonds and
179 principal and interest of the aforesaid unpaid coupons by the said defendant to said Eugene Kelly and Samuel A. Strang as aforesaid, together with the costs of court in these causes.

Eighth. It is further ordered, adjudged, and decreed that in the event it such payment and redemption as above provided for on the part of the defendant, The Atlantic and Gulf Railroad Company, these causes stand continued, with leave to the complainants, or either of them, to apply for appropriate relief in the event of any subsequent default in the payment of interest, and that in the mean time all proceedings therein be stayed.

Ninth. It is further ordered, adjudged, and decreed that all and singular the franchises and property of the said Atlantic and Gulf Railroad Company be sold (unless payment be made by the defend-
180 ant as above provided), subject to the amount of the prior liens and encumbrances found to be due, and stated in the 1st, 2n', 3rd, & 4th paragraphs of this decree, as the same may exist at the time of sale, and as in the said paragraphs of this decree provided, to wit, said property and franchises be sold subject to the sectional mortgages securing the payment of the bonds described in the 1st, 2d, & 3rd paragraphs, and to the mortgage or deed of trust made to Morris K. Jesup and John R. Gardner, as trustees as aforesaid, securing the payment of the bonds and coupons described in the 4th paragraph, except as to the January, 1879, and July, 1879, coupons on said bonds, together with the interest thereon; and the said property and franchises shall be sold under the said last-mentioned trust deed, in so far as the same secures the payment of said coupons, and the interest thereon; and said coupons and interest shall be paid out of the proceeds
181 of the sale, and subject also to all executory contracts made by the receivers under the authority of the court, which contracts, if any, must be publicly announced at the time of sale, and subject also to any liability that may be thereafter established against the receivers, growing out of any lawful acts done by them in their capacity of receivers, and such liabilities, if any, will remain a lien upon the premises until discharged, but subject to no other liens, claims, or incumbrances whatsoever.

Such sale, unless stayed by payment as hereinbefore provided, shall be made by John Screven and Samuel A. Strang, the receivers appointed by the court, or by the survivor of them, the successor or successors of such survivor, at public auction, in front of the United States custom-house, in the city of Savannah, southern district of Georgia aforesaid, on the fourth day of November, A. D. 1879, first giving notice of such time and place of sale by advertisement published, not
182 less than three times a week for six weeks, in one or more newspapers in each of the cities of New York and Savannah.

The said receivers or receiver shall sell the premises herein directed to be sold to the highest and best bidder, and shall require such bidder,

before making an adjudication to him, to pay in cash the sum of three hundred thousand dollars; should said bid be equal to or greater than this sum, and if the sale is confirmed by the court, the balance of the purchase money, if any, must be paid within thirty days after said confirmation, but the purchaser shall have the right to anticipate the day of payment.

After the payment by the purchaser of such sum in cash as may be sufficient to pay the costs, charges, and expenses of the trust of the complainant Morris K. Jesup, surviving trustee as aforesaid, and of the trusts of the complainants Eugene Kelly and Samuel A. Strang, trustees as aforesaid, and of these causes, the indebtedness of the
183 receivers, such claims as the court declares to be prior liens to the lien of the said mortgage or deed of trust made to said Eugene Kelly and Samuel A. Strang, as trustees as aforesaid, and orders to be paid out of the proceeds of the sale, and for the payment of the pro rata dividend out of the net proceeds of sale, for distribution, that may be due to other beneficiaries under the said last-mentioned trust deed, the receivers may receive from the purchaser in part payment of such purchase money the aforesaid bonds secured by said last-mentioned deed of trust, declared to be in the hands of bona fide purchasers for value, and such interest coupons thereon as may have become due and payable, at such rate per centum of the par value thereof as the purchaser would otherwise be entitled to be paid in cash in respect thereof, and of the net proceeds of sale on distribution thereof among the holders of such bonds and coupons, and the per-
184 centage so applied in satisfaction of the purchase money shall be treated as a payment of such bonds and coupons.

If any question shall arise as to the proportion of the purchase money that must be paid in cash, and the proportion thereof that may be paid in bonds and coupons, application may be made to the court.

In case of the failure of any bidder to comply with the terms of sale that are to be complied with on the day of sale, and before a final adjudication to the bidder, the receivers may reject the bid and proceed at once then and there to make a resale, or they may then and there publicly announce that on some other day to be then designated not more than ten days thereafter, and between certain hours of the day to be designated, they will at the same place make a sale of the premises under the decree without further advertisement, and they may make the same accordingly.

And said receivers are hereby authorised to employ any proper
185 person to conduct such sale.

Tenth. It is further ordered, adjudged, and decreed that the receivers report the sale and the proceedings under this decree to this court with all convenient speed, and give notice thereof to the complainant's solicitor, who may present the said report to this court or to the judges thereof at chambers on two days' notice to the purchaser and the defendant's solicitor. If, on presentation and consideration of the said report of sale, the court or the judges thereof at chambers shall confirm the sale, the complainant's solicitor must forthwith prepare and submit to the court, or to the judges thereof at chambers, a draft deed of conveyance from the receivers to the purchasers, and upon the settlement of the former thereof, and upon due compliance with the terms of sale by the purchaser, the receivers must execute and deliver such deed of con-
186 veyance to the purchaser, and the purchaser or his successors or successor in interest will then and thereupon be let into posses-

sion of the premises. The purchaser will also, and at the same time be entitled to, receive all books, maps, plans, papers, records, and documents of the defendant company, and of the several sectional parts thereof and relating to all extensions or branch roads of said company, and of the said receivers relating and appertaining to the franchises and property in question.

Eleventh. It is further ordered, adjudged, and decreed that by the sale and conveyance to be made as aforesaid of the property and franchises hereinbefore decreed to be sold by the said receivers, the defendant, and all persons claiming under it, shall be absolutely and forever barred and foreclosed of and from all estate, right, lien, claim, and equity of redemption of, in, or to or in respect of said property
187 and franchises so sold and conveyed and each and every part thereof.

Twelfth. It is further ordered, adjudged, and decreed that the receivers remain in possession of the mortgaged premises, and continue to operate the said railroad after the sale and until after the conveyance thereof. They will keep a correct account of the earnings and income of the premises accruing after the date of sale, and if the sale should be confirmed, the purchaser, on delivery of possession by the receivers, will be entitled to receive the net income and earnings accruing subsequent to the date of sale, and the proceeds of such income and earnings.

Thirteenth. It is further ordered, adjudged, and decreed if the sale shall not be confirmed by the court, the amount of purchase money paid by the purchaser shall be refunded without deduction, unless the non-confirmation thereof shall be due to the fault of the pur-
188 chaser, in which event such terms will be imposed as the court may think just and proper.

Fourteenth. It is further ordered, adjudged, and decreed that after the payment of the January, 1879, and July, 1879, coupons on the bonds secured by the aforesaid trust deed or mortgage held by Morris K. Jesup, surviving trustee as aforssaid, and the interest on such coupons, out of the proceeds of the sale, the said case of Morris K. Jesup, surviving trustee, against the Atlantic and Gulf Railroad Company shall stand continued until the further order of this court.

Fifteenth. And whereas various persons have intervened for their interest, claiming to have liens against the property of the Atlantic and Gulf Railroad Company as laborers, mechanics, or material men, or claiming to have an equity to be paid out of the moneys in the
189 hands of the receivers therein before the payment of the said bonds secured by the said mortgages, and the said interventions having been heard and considered:

It is further ordered, adjudged, and decreed that as to all claims of laborers and mechanics who have furnished labor or materials in and upon the said railroad and its appurtenances prior to the appointment of said receivers, which, by the laws of Georgia, entitle them to liens therefor, and who have taken the proper steps required by said laws to perfect said liens, by having the same recorded or otherwise verified within the time prescribed by law, such claims shall be, and are hereby, declared to be liens on the said property and the proceeds thereof, superior to the said mortgage executed and given to Eugene Kelly and Samuel A. Strang, but not superior to the other mortgages herein mentioned, but the claims of those who have furnished material only, but not as laborers and mechanics, although entitled to liens therefor
190 shall be postponed to all the said mortgages herein mentioned,

and no allowance is made or to be paid from the proceeds of said property or from the money in the receivers' hands to any other persons than to those who may have such liens as aforesaid, nor to the assigns of those claiming to have liens, unless the assignments were made after the liens were perfected, respectively. And it is hereby referred to Rufus E. Lester, esquire, as a master in chancery, appointed for this purpose, to examine the said claims and report to this court with all convenient speed such as are liens as aforesaid, the respective amounts due thereon, and their respective priorities according to the terms of this reference.

Sixteenth. It is further ordered, adjudged, and decreed that the proceeds of sale, together with the balance of money and assets which may remain in the hands of the receivers, shall be distributed as follows, that is to say:

191 1st. To the payment of the costs and expenses of these causes and of the execution of their trusts on the part of the complainants, respectively, and all such fees to counsel as may be hereafter allowed and directed to be paid, and of the indebtedness of the receivers, ascertained and liquidated at the time of the said sale.

II. To the payment of the taxes hereinbefore decreed to be due to the State of Georgia.

III. To the payment of the coupons for January and July, 1879, and the interest to be due thereon, on the bonds secured by the mortgage or deed of trust now held by Morris K. Jesup as surviving trustees as above provided.

IV. To the payment of such liens as may be decreed to be prior to the lien of the said mortgage or trust deed held by Eugene Kelly and Samuel A. Strang, trustees as aforesaid, and which have been herein decreed to be paid out of the proceeds of the sale.

192 V. To the payment of the bonds and coupons, with interest on such coupons, which have been hereinbefore decreed to be secured by the mortgage or deed of trust held by the said Eugene Kelly, and Samuel A. Strang, trustees as aforesaid, in the manner hereinbefore provided, and in case the proceeds of such sale shall be insufficient to pay such bonds and coupons, together with interest on the coupons, the same must be paid pro rata and without preference. Any surplus which may remain after distribution as aforesaid will remain subject to the further order of the court, and all questions touching such surplus and the distribution thereof are reserved.

Seventeenth. It is further ordered, adjudged, and decreed that all equities among the parties to these suits not disposed of or specially reserved in the foregoing decree, all questions of costs, expenses, and allowances and fees of counsel, and all other questions not dis-

193 posed of or specially reserved in the foregoing decree, but properly arising under the same, or as proper subjects for further direction, are reserved until after the sale and the report of the receivers of their proceedings thereon.

JOSEPH P. BRADLEY, *C. J.*
JOHN ERSKINE, *Judge.*

W. S. CHISHOLM, *Sol'r & Counsel for Compl'ts.*

194 And afterwards, to wit, on the 22d day of August, A. D. 1879, the following appeal of the State of Georgia was filed in words following, to wit:

Appeal of the State of Georgia.

The motion of the State of Georgia, by the attorney-general, for leave to levy certain fi. fas. in favor of said State, upon certain property of said defendant corporation, the same being for taxes and refusal of the same by the court.

The State of Georgia having filed a petition denying the jurisdiction of said circuit court of the United States, and claiming the right of said State to proceed with said fi. fas. notwithstanding that the property of said defendant corporation was in the possession and control of said circuit court through receivers appointed thereby; and the said circuit court having passed a final decree, so far as the rights and claim of said State in the premises were concerned, denying and refusing said claim and rights set up, and said State of Georgia being
195 advised that she has a good and valid cause of appeal, now comes the said State of Georgia, by the attorney-general thereof, during the term at which said decree complained of was rendered, and in pursuance of a notice given in open court immediately after the rendition of said decree, and prays this honorable court to grant an appeal in said cause to the Supreme Court of the United States on such terms and conditions as required by law.

Petitioner further prays that copy fi. fas. for taxes due the said State for the years 1874, 1875, 1876, 1877, and 1878, marked Exhibits A, B, C, D, and E, be filed with said original petition, and become a part of the record in said cause, said fi. fas. being numbered 10, 5, 15, 54, & 123.

Petitioner further showeth that said taxes claimed by the said State exceeds the sum of fifty thousand dollars.

ROBERT N. ELY,
Attorney-General.

Appeal granted.

J. P. BRADLEY,
Asso. Justice Sup. Court U. S., &c.
196 JOHN ERSKINE,
U. S. Judge.

JUNE 19, 1879.

And afterwards, on the 22d day of August, A. D. 1879, the following bond was filed, to wit:

Appeal bond.

UNITED STATES OF AMERICA,
Northern District of Georgia:

Know all men by these presents that the State of Georgia, by Alfred H. Colquitt, the governor thereof, as principal, and S. B. Hoyt and George Hillyer, of the city of Atlanta, in the northern district of Georgia, as sureties, are held and firmly bound unto Morris K. Jesup, surviving trustee, complainant in the cause of Morris K. Jesup, surviving trustee, against the Atlantic and Gulf Railroad Company, pending in the circuit court of the United States for the southern district of Georgia, in the full and just sum of five hundred dollars, for the true payment of which, well and truly to be made, we bind ourselves, o'r
197 heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents. Sealed with our seals, and dated this the 24th day of July, A. D. 1879.

The condition of the above obligation is such that whereas the State of Georgia, on the 3rd day of June, A. D. 1879, presented a petition to the honorable circuit court of the United States for the southern district of Georgia, praying that said State might be allowed to proceed with the collection of certain fi. fas. issued by said State for taxes against said defendant railroad corporation, and said circuit court having refused said petition, and the said State of Georgia having prayed an appeal to the Supreme Court of the United States, which said appeal has been allowed, and the bond fixed at the sum of five hundred dollars:

Now, therefore, if the said State of Georgia shall well and truly prosecute said appeal to effect, and if the said State of Georgia shall fail to make her plea good shall pay to said Morris K. Jesup, surviving
198 trustee, complainant as aforesaid, all costs incurred in consequence of taking said appeal, then this obligation shall be void, but otherwise shall remain in full force and virtue.

STATE OF GEORGIA,
By ALFRED H. COLQUITT, [SEAL.]
Governor.
S. B. HOYT, *Surety.* [SEAL.]
GEORGE HILLYER. [SEAL.]

Signed, sealed, and delivered, in presence of—

A. E. BUCK,
U. S. C. C. Commissioner, N. D. of Georgia.

UNITED STATES OF AMERICA,
Northern District of Georgia:

Personally appeared before me S. B. Hoyt and Geo. Hillyer, who, after first being duly sworn, deposes and says, that they and each of them signed and executed the foregoing bond as the sureties thereof, and that they and each of them are reasonably worth the sum of five hundred dollars over and above their just debts and exemptions allowed them by the laws of Georgia.

S. B. HOYT.
GEO. HILLYER.

199 Sworn to and subscribed before me this 24th day of July, A. D. 1879.

A. E. BUCK,
U. S. C. C. Commissioner, Northern Dist. of Georgia.

Endorsement.

Approved by Joseph P. Bradley, associate justice Sup. C't U. S., and circuit justice, July 28, 1879.
Filed August 22rd, 1879. W. M. Heyward, deputy clerk.

200 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Southern District of Georgia, ss:

I, Willard P. Ward, clerk of the fifth circuit court of the United States for the southern district of Georgia, do hereby certify that I have compared the writings annexed to this certificate, and that they are true copies of their respective originals, and are correct transcripts

therefrom, now on file and remaining of record in my office in the equity cause of Morris K. Jesup, trustee, &c., complainant, and the Atlantic and Gulf Railroad Co., and the State of Georgia, intervenor, defendants, that is to say, the original bill, order appointing receivers, order confirming receivers, supplemental bill, answer, motion by State of Georgia to collect taxes, order denying motion, final decree in cause, appeal of State of Georgia, appeal bond, and citation, lately pending in said circuit court and appealed by the State of Georgia to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said circuit court, at the city of Savannah, in said district, this 3d day of October, A. D. 1879, and of the Independence of the United States the one hundred and fourth.

[SEAL.] WILLARD P. WARD, *Clerk.*

201 *Citation.*

The United States of America, to Morris K. Jesup surviving trustee, The Atlantic and Gulf Railroad Company, and Eugene Kelly and Samuel A. Strang, trustees, and The Atlantic and Gulf Railroad Company, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington, on the second Monday in October next, pursuant to a writ of appeal filed in the clerk's office of the circuit court of the United States for the southern district of Georgia, wherein the State of Georgia is plaintiff in appeal and you are defendants in appeal, to show cause, if any there be, why the decree rendered against the said plaintiff in appeal, as in the said writ mentioned, should not be reversed, and why speedy justice should not be done to the parties in that behalf.

202 Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this the 28th day of July, A. D. 1879.

JOSEPH P. BRADLEY,
Asso. Justice Sup. C't U. S., and Circuit Justice Presiding.

Acknowledgment of service.

We acknowledge due and legal service of the within citation, and waive copy and all further service.

W. S. CHISHOLM,
Sol'r for Morris K. Jesup, Surviving Trustee, & Eugene Kelly & Samuel A. Strange, Trustees.
JACKSON, LAWTON, AND BASSINGER,
Sol'rs for Receivers.
R. FALLIGANT,
Sol'r for Atlantic & G. R. R. Co.

(Endorsement:) Filed August 22, 1879. W. M. Heyward, deputy clerk.

(Indorsement on cover:) No. 109. The State of Georgia, appellent, vs. Morris K. Jesup, surviving trustee, The Atlantic & Gulf Railroad Company, & Eugene Kelly and Samuel A. Strang, trustees, and The Atlantic & Gulf Railroad Company. S. Georgia C. C. U. S. Filed 20th October, 1879.

16458

SUPREME COURT, U.S.
FILED
NOV 17 1932
JAMES H. McKENNEY, CLERK

THE STATE OF GEORGIA,

Appellant,

vs.

M. K. JESSUP, Surviving Trustee, etc.,

THE ATLANTIC AND GULF R. R. CO., *et al.*,

Appellees.

BRIEF OF CLIFFORD ANDERSON,

Attorney General and Counsel for Appellant.

IN THE SUPREME COURT OF THE UNITED STATES.

THE STATE OF GEORGIA, *vs.* M. K. JESSUP, Surviving Trustee. THE ATLANTIC AND GULF RAILROAD CO., *et al.* No. 109.	Appeal from the Circuit Court for the Southern District of Georgia.

BRIEF OF CLIFFORD ANDERSON FOR APPELLANT.

It will be observed that, strictly speaking, the State of Georgia was not a party to the bill on which the Court below rendered the decree under consideration. The Attorney-General had applied to the Court to allow certain tax *fi. fas*, levied before receivers were appointed by the Court, to proceed. The validity of some of these *fi. fas* had already been adjudicated, not only by the State Courts, but by the Supreme Court of the United States also. Not only so, but it had been virtually decided that the State was entitled to recover the taxes and penalties for which these *fi. fas* had issued.

The Court below not only refused the application thus made by the State, through its Attorney-General, but assumed jurisdiction to decide as to the validity of the *fi. fas* in favor of the State and the levies made by virtue thereof, and, also, to what extent the claim and lien of the State for taxes, penalties and interest could be enforced.

In short, the Court not only refused to respect the prior jurisdiction acquired over the property levied on, but ousted the State Courts of jurisdiction to pass upon and determine the issues pending between the State and the Atlantic and

Gulf Railroad Company—a jurisdiction which had attached long before the bill was filed under which receivers were appointed and the decree in question was rendered.

It is respectfully insisted that the Court erred:

1. In denying the petition filed in behalf of the State, and in refusing to allow the tax *fi. fas* to proceed, it being conceded that the tax *fi. fas* were issued and levied long before the Court below acquired jurisdiction over the property levied on.

It is well settled that where property has been levied on by a Sheriff or other State officer, it cannot be subsequently seized or levied on by process issuing from the Federal Courts, and *vice versa*. U. S. *vs.* Dantzler, 3d Wood's C. C. Repts., 719; Hagan *vs.* Lucas, 10th Pet., 400; Wiswell *vs.* Sampson, 14th How., 52; Hall *vs.* Boyd, 52d Ga., 456; Atlanta *vs.* Grant, 57th Ga., 340; Taylor *vs.* Carryl, 20th How., 583; Freeman *vs.* Howe, 24th How., 450.

The Court below seems to have recognized the doctrine contended for, but denied its application in this case, basing its decision chiefly on Section 3669 of the Code of Georgia, which provides that:

"When an execution has been levied on property, and an affidavit of illegality filed to stay proceedings thereon, the property so levied on shall be subject to levy and sale under other execution, and the officer making the first levy shall claim, receive, hold and retain such amount of the proceeds of the sale as the Court shall deem sufficient to pay the execution first levied, including interest up to the term of the Court at which said illegality shall be determined; and any bond given by the defendant on filing such affidavit, shall be released and discharged, so far as relates to the property sold."

It is obvious, we think, that this section was intended to apply to executions issuing from State Courts, but, conceding that the appointment of receivers to take charge of the property in question, was within the equity of this statute, what then?

The statute clearly contemplates that the Court having

jurisdiction of the illegality case should go on and dispose of it.

Whilst such litigation was pending, other execution creditors should not be delayed, but they might sell the property, and the Court having jurisdiction of the process issued in their favor should do what? Decide the illegality case pending in another Court? Not at all; but should hold up such amount of the proceeds of sale as it should deem sufficient to pay the execution first levied, *including interest* up to the term of the Court at which the illegality shall be determined. By which is meant. not that the Court shall examine into and decide upon the merits of the illegality, but shall ascertain what is apparently or *prima facie* due, and retain that sum with interest to the time when the illegality will probably be disposed of.

Giving full effect, therefore, to this statute, and conceding its applicability to this case, the Court below should have decreed that the amount claimed by the State, with interest thereon, be retained and held until final judgment was rendered—if it had not already been—in the State Courts on the illegalities filed to the tax *fi. fas.* If final judgment had already been rendered on any of these illegalities—as we claim was the case—then, as to them, the matter was *res adjudicata* and should not have been disturbed by the decree rendered in the Court below.

2. But, if the Court had jurisdiction to pass upon the issues between the State and the Railroad Company, we respectfully insist that it erred in decreeing that the State was not entitled to recover any penalty on the taxes due.

Section 826 (a) of the Revised Code of Georgia (of 1882) provides that, "the President of all the Railroad Companies in this State shall be required to return, on oath, annually to the Comptroller-General, the value of the property of their respective companies, without deducting their indebtedness, each class or species of property to be separately named and valued, so far as the same may be practicable, to be taxed as other property of the people of the State, and said returns shall be made under the same regulations pro-

vided by law for the returns of officers of other incorporated companies, which are required by law to be made to the Comptroller-General."

Section 826 (b) provides that, "Said Presidents shall pay to the Comptroller-General the taxes assessed upon the property of said Railroad Companies, and on failure to make the returns required by the preceding section, or on failure to pay the taxes so assessed, the Comptroller-General shall proceed to enforce the collection of the same in the manner provided by law for the enforcement of taxes against the other incorporated companies before mentioned."

Sec. 876 provides that,

"If any corporation, company, person, agency or institution, who are required to make their returns to the Comptroller-General, shall fail to return the taxable property or specifics, or pay annually the taxes for which they are liable to the State Treasury, the Comptroller-General shall issue against them an execution for the amount of taxes due, according to law, together with the costs and penalties."

Sec. 878 provides that "the penalty or default tax on banks, railroads, and other corporations, where there is no special provision, shall be three times the amount of their lawful tax."

Whilst Sec. 826 (c) provides that Railroad Companies may litigate with the State as to its right to collect the taxes claimed, Sec. 826 (g) further provides that nothing in that or the two succeeding sections "shall alter or affect the penalties now provided by law against defaulting or delinquent corporations, companies, persons or institutions referred to therein, or to alter or affect the mode of enforcement of such penalties, now provided by law."

This Court decided in Stairs *vs.* Peaselee, 18 How., 527, that a penalty imposed by Act of Congress for undervaluing goods subject to duty is collectible. See also 10 Wallace, 436. Why may not the penalties imposed by the statutes of Georgia be enforced also?

3. We respectfully insist that the Court erred in refusing to allow and decree interest on the taxes due the State.

The Supreme Court of Georgia, in Wright *vs.* The Southwestern Railroad Company, lay down the rule, in substance, that unless a railroad corporation can show that its failure to pay its taxes when due was the result of an honest mistake, caused by its being misled by the Comptroller-General, it is liable to pay interest. See —— Ga. R., p. ——.

This being the construction placed on the statutes relating to taxes by the highest Court of the State, should, it is respectfully insisted, be decisive of the question.

It is only necessary to add that it was not pretended that the Atlantic and Gulf Railroad Company was misled, as to the taxes due by it to the State, by the Comptroller-General, or any one else.

CLIFFORD ANDERSON,

Attorney-General and Counsel for the Appellant.

1648

OFFICE SUPREME COURT U.S.
FILED
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SUPREME COURT OF THE UNITED STATES—CASE NO. 109

THE STATE OF GEORGIA, APPELLANT,

vs.

MORRIS K. JESSUP, SURVIVING TRUSTEE,
THE ATLANTIC AND GULF RAILROAD CO., *et al.*

SUPREME COURT OF THE UNITED STATES—CASE NO. 109

THE STATE OF GEORGIA, APPELLANT,

vs.

MORRIS K. JESSUP, SURVIVING TRUSTEE,
THE ATLANTIC AND GULF RAILROAD CO., *et al.*

ABSTRACT:

Morris K. Jessup, as surviving trustee, filed a bill in the Circuit Court of the United States for the Southern District of Georgia for the foreclosure of a mortgage executed on the 20th day of December, 1877, by the Atlantic and Gulf Railroad Co. to him and one John R. Gardner (since deceased), as trustees for the holders of bonds to the amount of $2,000,000, which said Company was about to issue and negotiate; $1,666,000 of which bonds were actually issued and negotiated thereafter. Said mortgage covered the railroad and its branches and other property held by said Company. Said bill alleged that said Company was very largely indebted to a large number of persons and that there were various liens on different sections and branches of said road, and that the company was greatly embarrassed and unable to pay its outstanding obligations. It also alleged that coupons for interest, amounting to over $50,000, due on the bonds which said mortgage was given to secure, were past due and unpaid, because the company had no funds with which to pay them.

The bill alleged that the affairs of said Company were complicated and embarrassed in various ways, and stated many reasons why a receiver or receivers should be appointed to take charge of said road and its branches and the other property covered by said mortgage, and to operate said road for the benefit of all parties concerned, under the order and direction of the Court. The appointment of receivers was prayed accordingly.

The bill also contained prayers for special and general relief.

A supplemental bill was also filed, making other allegations not necessary to be specially mentioned, and praying the sale of said road and its branches and other property.

The answer of the Company was filed objecting to the sale of the road and its branches, and the other property embraced in said mortgage, and setting forth at length its reasons for resisting said sale; also giving a detailed statement of the indebtedness of said Company and the liens outstanding on its property, including taxes due the State of Georgia.

On the 3rd day of June, 1879, and before any final decree was rendered in said cause, the State of Georgia, through its then Attorney-General, filed a petition to the Court, (see p. 44 printed transcript) stating that before receivers were appointed under said bill, said State had issued *fi. fas.* for taxes due, against said Company for the years 1874, 1875 and 1876, which had been levied by the Sheriff of Chatham county on certain property belonging to said Company; that the validity of said tax *fi. fas.* was contested by the Company, but decisions had been rendered by the Supreme Court of the United States in favor of the validity of the *fi. fas.* for the years 1874 and 1875, and fully sustaining the right of the State to the taxes claimed for those years; and that the other cases were still pending in the State Courts, action in them having been suspended to await the decision of said Supreme Court in the cases involving the taxes for the years 1874 and 1875.

The State therefore prayed to be allowed to prove the

foregoing allegations of fact, and prayed that, without being required to become a party to the pending bill, the Court would pass such order as would fully protect the rights of the State in the premises; she claiming

1. That said Court had no jurisdiction, by the process of injunction or otherwise, to hinder, delay or prevent the collection of her revenue.

2. That as the records show that certain of these *fi. fas.* had been levied by the Sheriff in obedience to processes from the State Courts, upon which issues had been joined by the defendant corporation, their jurisdiction could not be affected by a suit filed subsequently in the Courts of the United States; that the appointment of receivers and a sale by the latter jurisdiction would be inoperative and void.

3. That it is against public policy to require a State in the collection of her revenue to await the slow and tedious processes necessary to determine the numerous issues made in this cause between private litigants.

The tax *fi. fas.* issued by the State were introduced by the Attorney General. Copies of them are to be found in the printed transcript of the record commencing at the bottom of page 45.

The Court refused the petition filed by the Attorney General, and ordered the same dismissed. Afterwards, to-wit, on the 20th day of June, 1879, a final decree was made on said bill, the only part of which decree it is necessary to refer to is the sixth item, in which the Court decreed that said company was indebted to the State of Georgia for the years 1874, 1875, 1876, 1877 and 1878, the principal sums claimed by the State for taxes due for said years; but further decreed that neither penalty nor interest is due on the taxes for any one of the aforesaid years. The decree further provided that the said principal sums due for said years, and the principal sum to be due for 1879, when the same should be assessed by the Comptroller General, should all be held out of the proceeds of the sale thereinafter decreed, subject to the demand of the State of Georgia, and that the taxes so decreed to be due were prior to all other liens except

judicial costs. The decree also provided for the sale of said railroad and its branches and the other property belonging to said company

Afterwards the State of Georgia, through its then Attorney General, entered an appeal to the decision of said Court denying said petition, and to the decree rendered in said case, so far as it denied and refused the claims and rights set up by said State, and prayed that copies of said tax *fi. fas.* might be filed with said original petition and become a part of the record in said cause.

Said appeal was duly granted and a bond was duly filed and approved, and writ of error issued and served.

The errors now assigned to the rulings and decree of said Court, and which will all be insisted on, are:

1st. That the Court erred in refusing to allow said tax *fi. fas.*, and particularly those which had been duly levied, to proceed as prayed for in the petition, filed by the State of Georgia through her then Attorney General.

2d. That said Court erred in holding that said tax *fi. fas.* were illegally issued and had been illegally levied.

3d. That said Court erred in holding in effect that the possession of the receivers, appointed by said Court of said railroad and other property, divested the Sheriff of Chatham county of the possession of the property belonging to said company, which had been levied on by said Sheriff under and by virtue of said tax *fi. fas.*, and deprived said Sheriff of the right to sell said property so levied on in pursuance of said levies.

4th. That said Court erred in dismissing the said petition filed by said State through said Attorney General.

5th. That said Court erred in decreeing that no penalty was due said State on the taxes for any one of the years for which said tax *fi. fas.* had issued.

6th. That said Court erred in decreeing that no interest was due on the taxes for any one of said years.

7th. That said Court erred in decreeing that neither penalty nor interest was due on the taxes for any one of the aforesaid years.

8th. That said Court erred in refusing to decree that said State should recover and collect, out of the proceeds of the sale of said road and other property, the several amounts claimed by said State as penalties due by said company for said years.

9th. That said Court erred in refusing to decree that said State should recover and collect, out of the proceeds of the sale of said road and other property, the legal interest on said several sums, due for taxes for each of said years from the times when said taxes were respectively due up to the date of said decree.

CLIFFORD ANDERSON,
Attorney for Appellant.

OFFICE SUPREME COURT U.S.
FILED
NOV 23 1882
JAMES H. MCKENNEY, CLK

SUPREME COURT OF THE UNITED STATES.

No. 109.

STATE OF GEORGIA, *Appellant,*

vs.

MORRIS K. JESSUP, *Surviving Trustee;* THE ATLANTIC AND GULF RAILROAD COMPANY, and EUGENE KELLY and SAMUEL STRONG, *Trustees.*

BRIEF OF R. N. ELY,

For Appellant.

STATE OF GEORGIA, Appellant,

vs.

MORRIS R. JESSUP, Surviving Trustee; THE ATLANTIC AND GULF RAILROAD COMPANY, AND EUGENE KELLY AND SAMUEL A. STRONG, Trustees, etc., Appellees.

Mr. Justice Bradley delivered the following opinion in that case:

"In relation to the application made on behalf of the State for the collection of its taxes against the railroad company, we may remark, *in limine*, that the lien of the State for its taxes is undoubtedly prior to all other liens whatsoever, except judicial costs, which are first to be paid when the property is rightfully in the custody of the law. We are of opinion, however, that the suspension of the tax executions by the contestation thereof, under an affidavit of illegality, left the property levied on open to be proceeded against by subsequent executions, or other judicial process. This, we think, follows from a fair construction of section 3669 of the Code. This section declares as follows: When an execution has been levied on property and an affidavit of illegality filed to stay proceedings thereon, the property so levied on shall be subject to levy and sale under other execution, and the officer making the first levy shall claim, receive, hold and retain such amount of the proceeds of the sale as the Court shall deem sufficient to pay the execution first levied, including interest up to the term of the Court at which said illegality shall be determined; and any bond given by the defendant on filing such affidavit shall be re-

leased and discharged, so for as relates to the property sold."

We have no doubt that this release of the property in favor of a subsequent execution inures to the benefit of executions issued by the Circuit Court of the United States sitting in Georgia as well as to those issued by a State Court. The Circuit Court is not a foreign Court, though established by another jurisdiction. It is one of the Courts which, under our complex form of Government, is rightfully established for the administration of justice in the State of Georgia. The people of Georgia, and litigants therein, have State Courts to resort to, and in special cases, United, States Courts, as well. They are their own Courts in both cases—in the one case their own as citizens of the State; in the other case their own as citizens of the United States. The peculiar circumstances which give jurisdiction to the latter Courts do not affect their entire equality and concurrence of power to render judgments, or to carry them into execution. In this regard they have the same power and rights which the State Courts have. The form and modes of proceedure used in the United States Courts are precisely the same in all cases at law as those used in the State Courts, and the procedings in equity are not substantially different though different in form.

"We think, also, that the equity of the statute applies to a taking possession by a receiver under an order of Court as well as a levy under an execution. The appointment of a receiver in such a case as the present is for the purpose of preserving the property, preparatory to a sale of it. The receiver holds it as a sheriff would, subject to the prior lien of the execution, which is being contested. The lien is not disturbed. The Court will take care not only that it shall be respected, but will see that no injustice shall be done to the execution creditor by any unreasonable delay in satisfying his claim, either by a sale of the property or in some other mode. Perhaps, if the property levied on could possibly be sold separately so as not to injure other

parties interested therein, it would order that the execution might be carried into effect by a sale of the property under the same; but if that would be destructive of the whole property as an entirety, it would require the same to be sold in a manner more conducive to the rights of all concerned, but still, according to the execution creditor, the effect of his prior lien.

In our judgment, therefore, this Court did not exceed its jurisdiction in taking possession of the property through its receiver at a time when the levy under the execution was suspended.

But there is a difficulty in this case attending the tax levy made by the Sheriff, which, if not obviated by some decision, or course of decisions of the Supreme Court of Georgia, seems to us to render that levy ineffectual and void. A *fi. fa.* for taxes is subject to the same rules, as to the mode of its execution as other writs of *fi. fa.* are, which are issued on judgments in favor of private parties, and it seems to us that a portion of a railroad can not be levied on and sold by virtue thereof.

A railroad is a public highway, and a highway of a most peculiar kind. It is not land, nor like land in the ordinary sense. For though in form the railroad company may own the fee or some other legal estate in the strip of land on which the road is constructed, yet the company owns it and holds it under a franchise for a particular purpose, namely: that of a railway, for the operation of a railroad under and by virtue of the franchises which have been conferred upon it, and for the purposes of travel and transportation by the public. It is an artery of commerce; it is the means of communication between one part of the country and another. The interest which the public has in it is greater and more important than the interest which the company has in it. It cannot be supposed that the Legislature, in authorizing its construction, and granting peculiar franchises for its operation and use, ever intended that execution cred-

itors might levy upon parcels of it, and cut it up into sections and destroy it as a great public thoroughfare. Such a supposition seems to us preposterous. Suppose a mile of the road should be levied on and sold, would the purchaser have the right to fence it in and take up the rails and crossties and plant it, and thereby destroy the railroad? Could this be done without contemning the power of the State by which it was created and made a public highway?

We think not. There are other ways and means known to the law, or at least to equity, if not to the common law, by which creditors may compel the payment of their debts out of the property of the company—seizure of disconnected property belonging to the company, sequestration of earnings, or, if necessary, the sale of the entire road and its franchises. In one of these ways the rights of creditors can be protected, and the public would not be deprived of the means of communication which the erection and establishment of the line has created between different portions of the State, and between the State and other States of the Union. To sell it in parcels would be to sever an artery of commerce. It would affect the whole State in a vital part. Its public means of communication are essential to the prosperity of the people. They are the most efficient appliances of modern civilization.

We cannot believe the Supreme Court of Georgia, when the question is fairly presented, will ever sanction such a proceeding.

That Court, in the case of the Macon and Western Railroad Company *vs.* Parker, 9 Ga., 377, struck the key-note of the matter when it declared as follows through Judge Lumpkin:

[5.] "The facts of the case under consideration were novel and peculiar. Here was a road extending through six counties, and one hundred miles in length.

[6.] "What disastrous consequences would have resulted, if each judgment creditor had been allowed to seize and sell

separate portions of the road, at different sales, in the six different counties through which it passed, and to different purchasers! Would not this valuable property have been utterly sacrificed—the rights and interests of the creditors, as well as the objects and intentions of the Legislature in granting this charter, entirely defeated?

[7.] "I feel warranted in saying, that the whole history or equity jurisprudence does not present a case which made the interposition of its powers not only highly expedient, but so indispensably necessary in adjusting the rights of *creditors* to an *insolvent's estate*, as this did."

The Chancellor then, in taking the matter in hand and directing a sale of the entire interest for the benefit of all concerned was but invoking the powers of equity to aid the defects of the law; and so far from transcending his authority, he is entitled to the thanks of the parties and the country for the correct and enlightened policy which he adopted.

The Courts of law have now become so constituted that every Court may exercise equity powers, and no resort need be had to a separate Court of equity to mould and frame the process and proceedings in such manner as to prevent injustice and wrong. The Code has authorized the Superior Courts to frame their judgments and executions in accordance with equity, and in the recent case of The City of Atlanta *vs.* Grant, 57 Ga., 340, the following decision has been made:

1. "A chartered railroad, with all rights and privileges that properly appertain to it as an instrument of transportation, (excluding, of course, the franchise of the corporation to be a body politic) is property subject to be applied to the payment of its just debts, and the whole may be sold for that purpose, in this State, under a judgment at law.

2. "But the judgment, and the execution founded thereon, must be specially moulded, in substantial compliance

with section, 3082, 3562, 3639 of the Code; if not in all cases, certainly in a case where the railroad, in pursuance of the charter, has been located and partially constructed in three counties.

3. "A sale under an execution not thus moulded, about to made by the Sheriff, may be arrested by an affidavit of illegality interposed by the corporation through its proper officers.

4. "Such a sale, though consummated without legal resistance, would be void; and, consequently, the rights of other creditors, or of the stockholders, would not be lost."

Whether the executions in the present case have been moulded in such form as law and equity require, it is not proper for us to say. They command the Sheriff, generally, that of the goods and chattels, lands, tenements and franchises of the Atlantic and Gulf Railroad Company, they cause to be levied the amount of the taxes in question. This form may be sufficient to enable the Sheriff to proceed according to law, but not contrary to law. Various goods, chattels and lands of the company, might perhaps been found on which a lawful levy might have been made. Perhaps the terms of the execution would have authorized the Sheriff to levy on the road and franchises of the company as an entirety. But he has done none of these things. He has levied on a part, and a vital part, of the road, without which its business can not be carried on namely, the depots and the freight houses and passenger houses, and office. He has levied on the land without which the railroad must become a lifeless trunk. We are clearly of the opinion that this levy was void. Whether the railroad company has acquiesced, or has but faintly opposed this unlawful proceeding, we do not know. The bondholders and creditors who are represented in this cause, were not parties to the proceedings had in the Supreme Court, and are not bound thereby.

Under these circumstances we have no hesitation in say-

ing that this Court had power, at least during the suspension of the illegal levy, to take possession of the property by means of its receiver.

But the lien of the State for taxes does not depend on any execution or levy. It is declared by the Code, and is an independent lien, and this Court will take care that the full right of the State shall be preserved, so far as it shall be judicially brought to our notice.

The application for leave to proceed with the executions is denied. (The State of Georgia *vs.* The Atlantic and Gulf Railroad Company, 3 Woods, 434.)

The following are the provisions of the Statute Law of Georgia in reference to the lien of the State for taxes:

§812. (809.) *Taxes to be first paid.* Taxes shall be paid before any othsr debt, lien or claim whatsoever, and the property returned or held at the time of giving in, or after, is always subject.

§813. (810.) *Conveyances and judgments to avoid payment of taxes void.* All deeds of gift, mortgages, sales and assignments of property of any kind, made to avoid payment of taxes, or judgments procured to be rendered for the same purpose, are null and void.

§814. (811.) *Donee, etc., property liable.* The person holding such property, or to whom such conveyance may be made, is liable for such taxes, and the property also, whenever found, no matter in whose possession it may be.

§1973. *Rank of liens for taxes.* [Liens for taxes due the State or any county thereof, or municipal corporations therein, shall cover the property of tax-payers liable to tax, from the time fixed by law for valuation of the same in each year until such taxes are paid, and the property of tax collectors and their sureties from the time of giving bond until all the taxes for which they are responsible shall be paid. Such liens for taxes are hereby declared superior to all other liens, and shall rank between themselves as follows: *First* in rank, taxes due the State; *second*

in rank, taxes due the counties of the State; *third* in rank, taxes due to municipal corporations of the State.] (b.)

The following provisions will show the modes and processes adopted by the State for the collection of its revenue:

§3668. (3618.) *No judicial interference with taxes.* No replevin shall lie, nor any judicial interference be had, in any levy or distress for taxes under the provisions of this Code, but the party injured shall be left to his proper remedy in any Court of law having jurisdiction thereof.

§39. *Trial of cases when State is party.* The Judges of the Superior Courts and of the Supreme Court in this State, where cases are pending in said Courts, in which the State is a "party plaintiff" in civil cases, it shall be and is hereby declared the duty of said Judges to give preference over any and all cases so pending, to such cases, and to use all the power vested in them by law to bring such cases to a speedy trial; and shall, whenever required so to do by counsel for the State, take up said cases for trial, and proceed to try the same, unless the defendant can show some good cause for continuance, when the case shall be continued to a future time in the same term, or to the next term, in the discretion of the Court: *Provided*, nothing in this section contained shall affect the right of the State to continuance on a proper showing.

§105. *Tax—how reesistd.* If any Railroad Company affected by the preceding sections, desires to resist the collection of the tax therein provided for, said Company, through its proper officer may, after making the return required in section 103, above, and after paying the tax levied on such corporation by the Tax Act for 1873, and continuing to pay the same while the question of its liability herein is undetermined, resist the collection of the tax above provided for by filing an affidavit of illegality to the execution or other process issued by the Comptroller-General aforesaid, and stating fully and distinctly the grounds of resistance, which shall be return-

able to the Superior Court of Fulton county, to be there determined as other illegalities, *only the same shall have precedence of all cases in said Court as to time of hearing*, and with the same right of motions for new trial and writs of error, as in other cases of illegality, on the part of the Comptroller-General and of said corporation.

STATEMENT OF THE CASE.

The question involved is one of adverse process against the same property. The property is that of the Atlantic and Gulf Railroad Company, which was levied on for taxes due the State, and subsequently taken possession by a Receiver appointed by the Circuit Court of the United States for the Southern District of Georgia. In 1874 an Act was passed by the Legislature of Georgia taxing all the Railroad Companies in the State in the same way as other property. The object of the statute was to repeal the limited exemptions from taxation conferred upon Railroad corporations by their charters. The Act provided that these companies might defend their chartered rights by filing an affidavit of illegality to the executions issued for taxes; and that the issues thus made should be tried by the Superior Courts of the State.

The first execution issued under this statute against the Atlantic and Gulf Railroad Company was in November, 1874, and for the taxes claimed to be due for that year. It was levied on certain real estate, and an affidavit of illegality filed by the defendant corporation; the issue thus made was passed upon by the Superior and Supreme Courts of the State, and the case finally carried to the Supreme Court of the United States. In November, 1875, the second execution was issued for taxes for that year, levied on certain real estate, a like defense interposed, and that case also brought to this Court. In November, 1876, a third execution was issued, and a levy made on January 8th, 1877, but no

further proceedings were had, because the financial affairs of the defendant corporation was now in a critical condition. A bill was filed February 15th, 1877, by Morris R. Jessup, one of the appellees, in the Circuit Court of the United States for the Southern District of Georgia, alleging that the Atlantic and Gulf Railroad Company had made default in the payment of its interest coupons on bonds secured by a deed of trust or mortgage executed to said Jessup, covering the railroad and its appurtenances and all of its personal property. On the 20th day of February, 1877, receivers were appointed by the Circuit Court to take charge of the entire property (including that levied on by the tax executions), and to operate the railroad. In pursuance of this appointment, the receivers took charge of all of the property of the corporation, and operated the railroad for the benefit of the parties interested.

In November, 1877, the fourth execution was issued by the proper authorities of the State for taxes, due for that year, for the principal sum of $3,333.12, and also three times that amount as a penalty for the non-payment of said tax. On this execution the Sheriff of Chatham county made the following entry:

"Property by order and decree of the United States Courts now in the hands of receivers."

In March, 1879, the fifth execution was issued for the taxes proper for the year 1878, and for thrice the amount of the tax as penalty. No steps were taken to enforce this execution. (See Record, pp. 45–49, for copy executions.)

At the October term, 1878, of this Court the cases made under the first and second executions were determined, and it was held that the judgment of the Supreme Court of the State of Georgia sustaining the validity of the taxes claimed for the years 1874 and 1875 should be affirmed. (Railroad Company *vs.* Georgia, 98 U. S., 359.)

The question in controversy being settled, the State of Georgia on the 3d day of June, 1879, and before a final

decree had been rendered, filed a petition setting forth substantially the foregoing facts, and claiming the right to proceed with the executions on the grounds generally (1) that it had acquired jurisdiction over the property by a first seizure, and (2) that its demand was for taxes.

The Circuit Court denied the petition of the State, and ordered the same dismissed, and the State has entered an appeal to this Court. (Record, p. 49.)

See Brief, p. 1, for opinion of Justice Bradley.

ARGUMENT FOR APPELLANT.

If this is a case of concurrent jurisdiction between the Federal and State Governments, there must exist an absolute equality between those Governments so far as this subject is concerned. Mr. Hamilton, in 32 Federalist, in treating of the right of taxing articles other than exports, characterizes it as "manifestly a *concurrent and co-equal* authority in the United States and in the individual States." Hence, when a question arises involving a conflict of jurisdiction each tribunal or Government, must adopt such a course as will not only protect its own rights, but will also respect the rights of the co-ordinate and co-equal tribunal or Government. The decisions of the Courts of either, declaring its rights in the exercise of this power, may be invoked by the other as equally binding under similar circumstances. In Taylor *et al. vs.* Carryl, 20 How., 610, C. J. Taney said:

"I agree with the majority of my brethren in regarding it as among the first duties of every Court of the United States carefully to avoid trespassing upon the rights reserved to the States, or interfering with the process of their Courts when they are exercising either their exclusive or concurrent jurisdiction in the matter in controversy. And with the high trusts and powers confided by the Constitution to the Supreme Court, it is more especially its duty to

abstain from all such interference itself, and to revise carefully the judgments of the inferior courts of the United States whenever that question arises, and to reverse them if they exceed their jurisdiction."

Where property is liable to seizure under tribunals of concurrent jurisdiction, the universal rule is that that tribunal which first seized it has the paramount right.

It is analagous to the doctrine of title by occupancy, by first manual possession.

It is not novel or peculiar to the Courts of this country. (Payne *vs.* Drew, 4 East 523.)

In Peck *vs.* Jenness, 7 How., 625, it is declared that, "These rules have their foundation, not merely in comity, but in necessity. For if one may enjoin the other may retort by injunction, and thus the parties be without remedy, being liable to a process for a contempt in one, if they dare to proceed in the other. Neither can take the property from the custody of the other by replevin, or any other process, for this would produce a conflict extremely embarrassing in the administration of justice." Many efforts have been made in the Courts to depart from, or modify, this doctrine, but without success.

In Hagan *vs.* Lucas, 10 Pet., 400, it was urged that, becavse the property first levied on by the Sheriff by process from the State Court had been surrendered to the claimant under the provisions of the laws of Alabama, it was liable to seizure by the Marshal under execution from the United States Courts.

On p. 404 the Court said: "The property is not withdrawn from the custody of the law. In the hands of the claimant, under the bond for its delivery to the Sheriff, the property is as free from the reach of other processes, as it would have been in the hands of the Sheriff."

In Freeman *vs.* Howe, 24 How., 450, it was contended that inasmuch as the railroad cars levied on by the Marshal were not the property of the defendant in attachment, that

the Sheriff could lawfully seize them under a replevin suit in the State Court of Massachusetts, but the Court held that the questions of title to the property, the validity and regularity of the processes, as well as the jurisdiction of the Court, were matters exclusively for the determination of that Court that made the first seizure, and not for the State Courts.

In Ableman *vs.* Booth, 21 How., 506, the defense set up to justify the action of the State Court in releasing the defendant from arrest by the United States Commissioner, and from the sentence of the District Court was that the act of Congress was unconstitutional and void. C. J. Taney, delivering the opinion, page 525, said: "But it is hardly necessary to point out the errors which followed their mistaken view of the jurisdiction they might lawfully exercise; because, if there was any defect of power in the Commissioner, or in his mode of proceeding, it was for the tribunals of the United States to revise and correct it, and not for a State Court."

In Tarble's case, 13 Wall., 407, Justice Miller said:

"Such being the distinct and independent character of the two governments, within their respective spheres of action, it follows that neither can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the National government to preserve its rightful supremacy in cases of conflict of authority. In their laws, and mode of enforcement, neither is responsible to the other. How their respective laws shall be enacted; how they shall be carried into execution; and in what tribunals, or by what officers; and how much discretion, or whether any at all shall be vested in their officers, are matters subject to their own control, and in the regulation of which neither can interfere with the other."

In Peck *vs.* Jenness, *supra*, it is said: "It is a doctrine of law too long established to require a citation of authori-

ties that when a Court has jurisdiction, it has a right to decide every question which occurs in the cause."

To the same effect, Riggs *vs.* Johnson & Co., 6 Wall., 166.

When either (State or National Courts) is in possession of the *res* sought to be reached, the process of the other must pause until that possession has terminated. Amy *vs.* The Supervisors, 11 Wall., 136.

The record shows that three of the executions in favor of the State had been levied upon certain real estate of the Atlantic and Gulf Railroad Company before the filing of the bill in the United States Circuit Court in which a receiver was appointed.

The learned Chancellor presiding in the Circuit Court assigned as reasons for dismissing the petition of the State, and for his refusal to permit the execution to proceed, the provisions of the law of Georgia in regard to illegalities, and the character of the levies on the executions. Let us inquire, firstly, whether that section of the Code is subject to the construction put upon it; secondly, whether the Circuit Court had jurisdiction to inquire into the validity of the levies, and thirdly, what decree should have been rendered in the case?

That section is as follows:

§3669. (3618.) *Property may be sold under other executions.* When an execution has been levied on property, and an affidavit of illegality filed to stay proceedings thereon, the property so levied on shall be subject to levy and sale under other execution, and the officer making the first levy shall claim, eeceive, hold and retain such amount of the proceeds of the sale as the Court shall deem sufficient to pay the execution first levied, including interest up to the time of the Court at which said illegality shall be determined; and any bond given by the defendant on filing such affidavit shall be released and discharged so far as relates to the property sold.

(1.) It may be doubted whether the object of this section was to confer jurisdiction on any Court in the State of Georgia other than the one under which the first levy had been made.

This section is embodied in the Act ot 1845. Prior to that Act of the Legislature, the common law was in force, which declared that property once levied on was in *gremio legis*, and could not be seized by the same or any other Sheriff. (1 Holt, 643; 1 Show., 174; 4 Bac. Ab., 389; Woodfalls Tenant's Law, 389 cited and the doctrine approved in Hagan *vs.* Lucas, 10 Pet., 404-5.

The issues arrising on affidavits of illegality are tried by the Court from which the execution issued. (Code, §3666.)

By the Constitution and laws of Georgia, Defendants, excepting in a few specified cases, are subject to suit only in the counties of their residence. (Code, §§5169, 5170, 5171 and 5172.)

To remedy the delay under the technical rules of the common law, to other execution creditors against the same defendant, the Act of 1845, and that section of the Code, were adopted As a matter of fact all of these issues in almost every case would be determined in the same Court, and the levies made by the officers of the same county.

(a.) But the Court under whose authority the first levy was made, did not lose jurisdiction any further than was necessary to permit the property to be sold under the second process. A sufficient amount of the proceeds is to be reretained *as the Court shall deem sufficient to pay the execution first levied, including interest up to the time of the Court at which said illegality shall be determined.*

What Court? Manifestly the Court to which the illegality is returnable, and not the Court issuing the second execution.

A sufficient amount of the proceeds of the sale is to be placed in the hands of the Court in lieu of the property seized. Previous to the trial the Court could only order the full amount claimed in the executions to be retained.

(b.) At the time of filing this petition of the State, no issue of illegality was pending—all of the cases arising thereon had been determined in its favor.

(c.) The Court treated this case as if it were between ordinary execution creditors, but a sovereign State of the Union was the party plaintiff. State is not bound by general statutes unless expressly named. (Doe, *ex dem*, Gladny *et al.*, *vs.* Deaveas, 11 Ga., 89; State *vs.* Kennie, 41 N. H., 238; State *vs.* Garland, 7 Ired., N. C. L., 48. Nor by a statute by which any of its prerogative rights would be curtailed or taken away unless the language is express. Martin *vs.* the State, 14 Tex., 61. Nor by the statutes of limitations in the absence of a special provision to that effect. Doe, *ex dem*, Daggett, *vs.* Roe, 20 Ga., 467; Moody *vs.* Flemming, 4 Ga., 115; Brinsfield *vs.* Carter, 2d Kelly (Ga.,) 143; Bac. Ab. title Statutes.

(d.) By the law of Georgia all suits in which the State is a party, plaintiffs are to have the preference for trial in the Courts. (See Sec. copied in brief *ante*.)

A second execution issuing from the Courts of this State in favor of a private person could not have taken this property from the Sheriff of Chatham county.

(e.) Since the passage of the Act of 1804 the law has been settled in Georgia that no replevin should lie, or judicial interference be had, with suits for the collection of taxes, nor has this rule been changed excepting by the Act of 1874, authorizing railroad companies to interpose affidavits of illegality to protect their chartered rights. (See brief *ante* for sections of Code.)

(f.) This was not only a case in which the State was a party plaintiff, but also one in which it was suing for the collection of its revenue.

A similar case arose in the United States District Court of New York, reported in 13 Blatch., 104, Stevens *vs* The N. Y. & O. M. R. R. Co., in which Judge Blatchford said:

"This is a suit for the foreclosure of a mortgage on cer-

tain property owned by the New York and Oswego Midland Railroad Company, a corporation. Pending the suit, John G. Stevens and Abram S. Hewitt have been appointed by this Court receivers of the mortgaged property. They now apply to this Court, by petition, for injunctions to restrain the tax collectors of certain towns in the State of New York from proceeding to interfere with the property which is in the hands of such receivers, by selling it under warrants to satisfy certain State taxes. One ground of the application is, that the imposition of taxes on the corporation, or its property, is in violation of the Constitution of the United States, as impairing the obligation of a contract made between the State and the corporation. This question has heretofore, on a separate argument, been decided by this Court adversely to the receivers. (Hewitt *vs.* N. Y. & Oswego Midland R. R. Co., 12 Blatchf. C. C. R., 452.) The matter has now been argued upon objections made by the receivers to the mode of assessing the taxes.

"But, a preliminary point is taken, that this Court will not, in this way, examine the questions raised as to the regularity of the assessment of the taxes. The tax collectors are not parties to this suit. This Court is not a tribunal to which any direct power is confided to supervise or review the regularity of the assessment of the taxes, as on *certiorari*. Nor are the questions raised between the adversary parties to a plenary suit, with its regular procedure in the way of trial and opportunity for review, but they are brought up on motion, in a collateral action. It is, however, contended for the receivers, that the property in their possession is in the possession of this Court; that such possession cannot be disturbed without the consent of this Court; and that, before this Court will consent to part with the possession of the property which may be required to pay the taxes, it will assure itself that the tax collectors are lawfully entitled to subject it to the claims for taxes.

"I have heretofore decided that the property in the

hands of the receivers was properly assessed as the property of the corporation. There is no prorogative of sovereignty which is of higher importance than the power of taxation, which includes the collection, as well as the assessing, of the taxes. The very existence of the State as a government depends upon the exercise of such power. Except under very special circumstances, such power ought not to be interfered with by injunction. The promptness and regularity of the collection of taxes are as important to the welfare and credit of the government, and to its capacity to fulfil its functions, as is the collection itself. If any person is aggrieved by the exercise of the authority of the tax collector, he has an adequate ultimate remedy in an action against the wrong-doer, with the preliminary remedy afforded, of directly reviewing the proceeding according to the method, and before the tribunal, provided by the laws of the government under whose authority the proceeding takes place. There is no sound principle upon which the property of a person or a corporation, which is placed in the hands of a receiver by a Court of justice, for the purposes of a suit pending in such Court, can be regarded as being thereby rendered exempt from the operation of the tax laws of the government within whose jurisdiction such property is situated. So far as appears, the warrants in the hands of the tax collectors are regular on their faces, and the tax collectors are acting thereunder in good faith, in the discharge of their duty. Under such circumstances, this Court would not hold the collectors to be guilty of a contempt of this Court for levying on the property of the corporation to satisfy the taxes specified in the warrants. That being so, this Court will not undertake to determine, on affidavits, and in a collateral suit, the questions raised as to the irregularities alleged to have existed in the assessment of the taxes, or to enjoin the tax collectors from executing the warrants.

"The application for injunctions must be denied and the temporary injunctions must be dissolved."

So in the case of the United States *vs.* Beinden, 2 Cliff., 57, Judge Clifford declared that:

"Possession by the Sheriff under a civil process, whether from a State or Federal Court, will not, in my opinion, defeat the operation of the revenue laws of the United States, or the laws imposing a forfeiture for engaging in the slave trade, or fitting, equipping or preparing vessels for that purpose."

In the State of Georgia the law declares that the tax-payer is bound for taxes from the time when he is required by law to return it, and that all sales made by him, or by the assignee in bankruptcy, or by the Circuit Court of the United States, do not divest the lien of the State.

Code, §§ 812, 813, 814.

Doe ex dem Gladney *et. al.*, *vs.* Deavors, 8 Ga., 479.

Stokes *vs.* The State of Georgia and County of Lee, 46 Ga., 412.

The Atlanta and Richmond Air Line Railroad Company *vs.* The State, 63 Ga., 483.

It is expressly enacted that no suit for the purpose of restaining the assessment or collection of any tax shall be maintained in any court (Rev. Statutes, 3224. See also Rev. St., 720).

In State Railroad Tax case, 92 U. S., 575, it is declared "that neither illegality, nor irregularity in the proceedings, nor error, nor excess in the valuation, nor the hardship or injustice of the law, provided it be constitutional, nor any grievance which can be remedied by a suit at law, either before or after the payment of the tax, will authorize an injunction against its collection."

"The rule is founded on the principle that the levy of taxes is a legislative and not a judicial function, and the Court can neither make nor cause to be made a new assessment if the one complained of be erroneous, and also in the necessity that the taxes, without which the State could not exist, should be regularly and promptly paid into its treasury."

The decree of the Court below in refusing to permit the executions to proceed was the same in effect and principle as granting an injunction against their enforcement.

(g). We cannot suppose that it was the intention of the Legislature in adopting section 3669 of the Code to make its provisions apply in their full extent to affidavits of illegality if filed by railroad campanies, for the reason that the act of 1874, which gave them this privilege, provided also for the prompt and speedy trial of the issues involved. (See that section of the Code. Brief *ante.*)

(2.) If the Circuit Court had no jurisdiction of the *res* or the case between the State and the corporation, it clearly had no right to pass upon the validity of the levies made to enforce the executions. All questions involving the amounts of the taxes owing, and the regularity of the process, were for the determination of the Court that issued the executions. 20, How; 24, How; and other cases cited *supra.*

In Buck *vs.* Colbath, 3 Wall, 334, Justice Miller, referring to Freeman *vs.* Howe, said:

"In that case it was held that, although the writ of attachment had been wrongfully levied upon the property of a party not named in the writ, the rightful owner could not obtain possession of it by resort to the Courts of another jurisdiction."

He then announces the entire satisfaction of the Court with the decision and the principle on which it is founded, and declares that is essential to the dignity and just authority of every Court and to the comity which should regulate the relations between all Courts of concurrent jurisdiction.

It is respectfully insisted that the Court below decided this cause as if it had been removed there in its entirety, but there is no provision of law for such removal of a case from the State Court into the Circuit Court of the United States.

The learned Judge declared that the Federal and States were not to be regarded in their relations as foreign or un-

friendly tribunals, but it is respectfully insisted that so far as their respective rights and concurrent powers are concerend they are as distinct and independent of each other as any two sovereign nations of the earth. (Ableman *vs.* Booth, 21 How *supra.*)

(3.) Lastly, we must conclude, if the State had acquired jurisdiction of the property levied on in consequence of the first seizure, it should have been surrendered by the Federal Court.

It would have accomplished the same result if an interlocutory decree had been granted permitting the State to proceed with their collection. Or the property might have been sold subject to the claim of the State.

All of these different courses are discussed and approved in Wiswall *vs.* Simpson, 14 How., 52.

If the U. S. Circuit Court had jurisdiction to determine the amount of taxes due the State, it should have decreed interest as well as the principal. (Code, §3669.) In Wright, Comptroller General, *vs.* The State, 64 Ga., 800, the Court say: When the complainant comes into a Court of equity the universal rule is that it must do equity, and inasmuch as it owes the State taxes on part of its property not covered by the limitation in its charter, it would seem, perhaps, equitable that it should pay interest from the time the tax was claimed by the officers of the State, at least; but as this would depend upon facts which may shed further light in regard to whose fault caused the delay in its payment we do not now positively decide this question." By the laws of Georgia all liquidated demands bear interest. (Code, §2056.)

Some of these executions were also for penalties, because the 4th Section of the Act of 1877, declared " that nothing in this Act contained shall alter or affect the penalties now provided by law against defaulting or delinquent corporations, companies, persons or institutions, referred to in this Act, or to alter or affect the mode of enforcement of such penalties now provided by law."

The penalty accrues by failing to make a return of their property for taxation, and also by failure to pay the taxes assessed. (Code, §876.) And that penalty is three times the amount of the tax assessed. (Code, §878.)

The Court did not allow either penalties or interest.

R. N. ELY,
Of counsel for appellant.

Supreme Court of the United States.

No. 109.

THE STATE OF GEORGIA, APPELLANT,

vs.

MORRIS K. JESSUP, Surviving Trustee, THE ATLANTIC AND GULF RAILROAD COMPANY and EUGENE KELLY and SAMUEL A. STRONG, Trustees, and THE ATLANTIC AND GULF RAILROAD COMPANY.

Appeal from the Circuit Court of the United States for the Southern District of Georgia.

BRIEF OF R. TOOMBS, OF COUNSEL FOR STATE OF GEORGIA.

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1st point. The first question which presents itself for decision in this case is: Did the circuit court have jurisdiction over the parties and the subject matter in controversy? We respectfully suggest that court had jurisdiction over neither one or the other, not the appellant, for she is a State of the Union and not liable to be sued by any of the parties to this record, under the Constitution of the United States, for any cause whatever, nor could the United States circuit court, by any notice, judgment, or decree in said cause, by no consent or waiver of jurisdiction by any officer of the State government, cure the defect in any decree or judgment. If it could be done at all, it could only be done by an act of her Legislature, that is, by law; but

no such waiver by any officer of the government of Georgia or by any law of the State appears from the record.

2d. Neither circuit courts of the United States, nor her State courts, have any jurisdiction over the subject matter of this suit, it being the general tax law of the State of Georgia, except by her consent duly given by law. It is one of the attributes of all governments which, by its organic law, is empowered to raise, collect, and appropriate taxes for the public service. Governments cannot exist without these powers.

92 United States Reports, 878.

3d. But the circuit court had jurisdiction neither over the parties nor subject-matter; the appellee was estopped from setting up either of the defences against the payment of the taxes alleged to be due the State in the Attorney General's petition, because the State of Georgia opened her own highest courts to the appellee to hear and determine all such matters as those decided by the United States circuit court, and also allowed writs of error to this Court for all possible legal defences which the appellee might choose to plead against the validity of the taxes, or the instrumentalities by which the State sought to enforce them. The appellee availed himself of the offer; went first to the superior court of Fulton county, then to the supreme court of the State, then to this Court. (See Ga. Repts., vol. ; 98 U. S., 359.)

But if the court did not err in deciding that the *fi. fas.* and levy were void, yet, being in a court of equity, it is respectfully submitted that it erred in not decreeing to the appellant all that was due under her tax laws. This principle was fully sustained in the Illinois Tax Cases, (92 U. S., 575,) before referred to, where the circuit court took jurisdiction over this question, as a condition precedent to its exercise, even when expressly granted by State law, to compel the complainants to pay all the taxes due the State,

whether a *fi. fa.* had ever been issued or not. (Illinois Tax Cases, 92 U. S.) The payment of the taxes due the State might be ascertained by any legal method, and should be first paid. But without ascertaining that fact in any method whatever the receivers of the court seized the property levied on by a State officer by virtue of a *fi. fa.* issued under the authority of law by the Comptroller General, and subsequently sold the same by a decree of the circuit court of the United States. This proceeding is sought to be justified under the decisions of the supreme court in the cases of the Macon and Western Railroad Company *vs.* Parker, (9 Ga., 377,) and the City of Atlanta *vs.* Grant, (57 Ga., 340.)

But it is respectfully submitted that neither case sustains the position decided by the circuit court. There was no question in either case about the jurisdiction; the jurisriction in both of those cases was conceded, if an equitable case was made out under the general jurisdiction of courts of equity in England or the State of Georgia. They were not cases where judicial interference was prohibited by law. They were not cases asserting any right to sue a State or the United States without her express authority granted by law, and we may grant that they were properly decided, without in any way compromising our case; and I think they were well decided.

6th. It is further insisted that the appellees, having accepted the statutory remedy, which was ample, full, and complete, and admitted every defence to the legality of the taxes, and the *fi. fas.* issued by the Comptroller General as fully and completely as it was possible in any court of law or equity.

The appellees are estopped from pleading anywhere or in any other tribunal, State or Federal, all the matters and things alleged in this case.

These points were decided against the Atlantic and Gulf Railroad in the superior court of Fulton county, Ga.;

secondly, in the supreme court of Georgia, (55 Ga., p. 512, and 60 Ga., p. 26,) and also in the Supreme Court of the United States, (98 U. S., 366,) all of which tribunals decided that the defendants had no exemption from taxation, and that the *fi. fas.* issued by the Comptroller General of Georgia should proceed to make the taxes, and he was proceeding according to the order given by all these courts, until arrested by the authority of the circuit court of the United States for Georgia.

We further submit that the legal officers of the State of Georgia having the property in possession, the seizure of the same by the receivers of that court was, and is, illegal and void, and the sale made by such receivers was null and void.

Taylor *vs.* Carroll, 20 Howard, 610.
Freeman *vs.* Howe, 24 Howard, 450.
Wiswall *vs.* Sampson, 14 Howard, p. 52.

R. TOOMBS,
Of Counsel for the State of Georgia.

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Supreme Court of the United States.

OCTOBER TERM, A. D. 1882.

No. 109.

THE STATE OF GEORGIA, APPELLANT,

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ARGUMENT OF R. N. ELY, FOR APPELLANT.

It is not necessary to enter into any detailed statement of this case, as the Court is already in possession of the facts. Three of those executions had been issued by the State of Georgia for taxes, and levied prior to the period when this property was taken possession of by a receiver, under a bill filed in the United States circuit court. Your honor, the Chief Justice, has inquired if the State has not gotten all that it claimed. The deficiency between the amounts claimed on the face of the executions and that actually received was, in round numbers, $66,000. This latter sum was, of course, penalties; but these were as much parts and parcels of the executions as any other amount stated in them. The court granted the taxes proper, but refused the penalties and interest, although the State had not submitted these questions to its jurisdiction. The amount of the interest claimed was less than $20,000. The imposition of taxes, including penalties, are legislative not judicial ques-

tions. (State R. R. Tax case, 92 U. S., 575.) But if the company were relieved of the penalty, certainly it ought to have paid interest from the assessment of the taxes. The Court has heard the petition by which the State acquired a status in that court. It came into the circuit court for the purpose, and the purpose alone, as the State claimed that the circuit court had no jurisdiction by its process of the appointment of a receiver, or otherwise to hinder, delay, or prevent the execution of the revenue laws provided by the State of Georgia for the collection of its taxes. It came, denying jurisdiction—protesting against it. It came for a good purpose, because it was declared to be for the object of promoting that harmony and comity which should ever prevail between the State of Georgia, as one of the members of the Federal Union, and this Government. (Transcript of record, 45.) The decision of the court was that the petition be dismissed; and it was accordingly dismissed, and the State appealed. (Record, 49, 57.)

I understand that it is not disputed that the inflexible rule of law is where a question of concurrent jurisdiction is raised between two tribunals or governments, that the first seizure gives the paramount right. One of your honors inquired, yesterday, whether since lands are not subject to manual occupation, like goods and chattels, the rule would apply to a simple levy upon realty. I maintain we are not to put so narrow construction on the rule, as to require that it must be a manual seizure only. The question is possession! Possession by the tribunal. Whether it be by manual occupation, actual seizure, or by a simple levy, or however it may be, "Does the tribunal which first acquires possession of the suit or the *res*, have the right to go on and administer it?" I do not care how that possession is evidenced; it might be by the throwing of a stone, or as at the common law by the casting of a shoe on the land. If the law of the State declares that it is a good levy—a good possession—it is a good levy and a good possession, and gives the court acquiring it paramount jurisdiction.

Although in the cases of Taylor *vs.* Carryl, Freeman *vs.* Howe, and others, the property seized was personalty, yet the court did not rest the decision on its peculiar nature as distinguished from realty. No such distinction is drawn; on the contrary, in another case, this Court declared "when real estate is in the custody of a receiver, appointed by a court of chancery, a sale of the property under an execution issued by virtue of a judgment at law, is illegal and void."

Wiswall *vs.* Sampson, 14 How., 52.

In that case it was real estate in the possession of the law. The receiver was acting under the authority of the Alabama courts, while the execution issued from the Federal courts.

Mr. Justice BLATCHFORD: Is not that the case with regard to all of the authorities that have been referred to—that the property was in possession of the court?

Mr. ELY: Yes, sir.

Mr. Justice BLATCHFORD: Take the case of an execution on a common law judgment in a State court. The property comes into the hands of the sheriff. Do you hold that the possession of the sheriff under that execution is the possession of the court?

Mr. ELY: Why, undoubtedly, your honor.

Mr. Justice BLATCHFORD: The court does not direct the execution to issue; it is the statute of the State.

Mr. ELY: I understand, your honor; but Hagan *vs.* Lucas expressly decides that the possession of the sheriff is the possession of the court. It further held that the claimant's possession was that of the law.

If the execution be against A, and it is levied on B's property, this does not deprive the court of jurisdiction, for in Buck *vs.* Colbath, 3 Wall., 334, Justice Miller, referring to Freeman *vs.* Howe, said:

"In that case it was held that, although the writ of attachment had been wrongfully levied upon the property of

a party not named in the writ, the rightful owner could not obtain possession of it by resort to the courts of another jurisdiction."

He then announces the entire satisfaction of the court with the decision and the principle on which it is founded, and declares that is essential to the dignity and just authority of every court and to the comity which should regulate the relations between all courts of concurrent jurisdiction.

It is true the court held in the above case that the marshal was liable in trespass for the illegal levy, but the exact point I wish to impress on the Court is that the invalidity of the levy does not affect the operation of the rule of concurrent jurisdiction.

Mr. Justice BLATCHFORD: But in that case the court held that the forthcoming bond which was given by the defendant in the execution put the property in the possession of the court.

Mr. ELY: Yes; the property was in the possession of the claimant and he executed a bond.

Mr. Justice BLATCHFORD: And that the Court had the right in certain contingencies to order the forthcoming of that property.

Mr. ELY: The principal and sureties were liable if a breach occurred.

Mr. Justice BLATCHFORD: In a case I put to you of an execution on an ordinary common law judgment, the sheriff levies upon the property, as the property of the defendant in the execution. Do you mean to say—and I put this to test your argument—do you mean to say that a citizen of another State, who may claim that, as his property may not, by a suit in the Circuit Court of the United States, bring that property there, and try the right of the sheriff to seize it as the property of the defendant.

Mr. ELY: I suppose on the authority of Buck *vs.* Colbath the sheriff could be sued in trespass for the illegal

levy in the United States courts, if it were founded on a general judgment. If he were ordered by the process of the court to seize that particular property he would not be liable. But the property itself, the *res*, though illegally *levied* on, could not be transferred to another jurisdiction. The fact of prior possession being in one court all questions of title, the validity of the process, and even of jurisdiction, must of necessity be settled in that tribunal.

Amy *vs.* The Supervisors, 11 Wall., 136.
Freeman *vs.* Howe, 24 How., 450.
Peck *vs.* Jenness, 7 How., 625.
Riggs *vs.* Johnson Co., 6 Wall., 166.

Unless that was the case how could property ever be in the possession of the law when it is levied on, because the sheriff is but the representative of the law; he is simply the officer of the law; and so property in the possession of a receiver is in possession of the court.

Mr. Justice BLATCHFORD: I did not mean to say that the law was not in possession of it.

Mr. ELY: I misunderstood your honor. The court in which the judgment at law is rendered is in possession of the property when the sheriff takes it under an ordinary execution at law.

Mr. Justice BLATCHFORD: He takes possession of it by virtue of the statute of the State, and not necessarily by virtue of any order of the court.

Mr. ELY: The distinction is that he is not in possession of it, so as to prevent his being sued in trespass if he levy on property which does not belong to the defendant in execution, as was decided in Buck *vs.* Colbath, but his possession is still that of the court until the property is released by the judgment of the court.

Mr. Justice BLATCHFORD: That was a suit in replevin in a Federal court.

Mr. ELY: It is for the determination of the court that

acquires possession of the *res* in the case in dispute to pass upon every question arising, whether the levy be tortious, illegal, or void, or whether the court has jurisdiction.

It was replevin, if I remember correctly, in the State court of Massachusetts to recover possession of railroad cars levied on by the marshal. The cars were not the property of the defendant in attachment. The Supreme Court held that though the marshal had not been ordered by the process of the Federal courts to seize that particular property, and although the levy was, in fact, illegal, the replevin could not be maintained in a court of another jurisdiction for their recovery.

In Georgia it has been held that, "Where property is levied on under an execution from the circuit court of the United States, and subsequently by process from a State court, and advertised for sale on the same day under both levies, the sale under the last levy will be enjoined." (Hall *vs.* Boyd, 52 Ga., 456.)

That was an execution on real estate from the State courts which had been previously levied on by an execution from the United States court. Both levies were made not, by actually seizing the land, but by endorsing entries of levy on the executions, in accordance with the practice of that State. By the law of Georgia they are good levies—as good seizures—as if there had been a manual occupation of the land.

Mr. Justice MILLER: Did the court hold that the levy was void, or that both sales could not proceed?

Mr. ELY: The court said the sale under the last levy would be enjoined.

Mr. Justice MILLER: It would enjoin its own State court?

Mr. ELY: Yes; this court has said that the last sale is void when a levy is made on property in the hands of a tribunal that had first obtained the possession of it. This

is the doctrine in Taylor *vs.* Carryl, where a vessel was levied on, and in Wiswall *vs.* Sampson.

Mr. Justice MILLER: That is going back over the same ground. The cases of Taylor *vs.* Carryl and Wiswall *vs.* Sampson were cases of personal property. I concede that your Georgia statute may make a difference in that respect. There cannot be three sales of property subject at the same time to execution. There are States which provide that for what I have referred to, and I do not know but what it is a very wise thing. After all, however, is the levy of a tax execution like the levy of a judgment? Could not you have gone on—

Mr. ELY: It is much superior. I think your honor will find that in Wiswall *vs.* Sampson the property levied on was land and not personalty. If, as I maintain, there be no difference whether the property is real or personal, those cases decide the sale of the property that had been first levied on by State process was illegal and void.

Mr. Justice MILLER: Can a man avoid paying his taxes to the Government by putting his property in the hands of a receiver?

Mr. ELY: No. His honor, now in this Court, in the district court of New York decided that he would let the State go forward and collect its taxes, although the property was in the hands of a receiver under the United States court. He declared that there was no sound principle of law which exempted property at the suit of private parties from the operations of the tax laws of the government in whose jurisdiction it was situated. (Stevens *vs.* the N. Y. & O. M. R. R. Co., 13 Blatch., 104.)

The CHIEF JUSTICE: That brings you to the very point that troubles me in this case. Is there anything in the judgment of the court below, or the decree of the court below which prevents you from carrying into effect the executions that were issued before this decree was rendered?

Mr. ELY: Your Honor, if you will so decree we will stop the case.

The CHIEF JUSTICE: Is there anything, I ask, in the decree of the court below, which prevents you from carrying into effect the executions that were issued before this decree was rendered? You came into court and asked the court to let you go on and sell your property. That is it, substantially.

Mr. ELY: Yes, I understood that this was the petition of the State.

The CHIEF JUSTICE: The court said substantially that they would say nothing about that; that they would pay you the taxes upon your property out of the proceeds of the sale. Now, I ask whether there is anything in the case to show that the decree of the court prevents you from carrying into full effect the executions as they were issued originally.

Mr. ELY: The rule, as I understand it, in cases of concurrent jurisdiction, is that the tribunals have a perfect equality between them, but this court has made one exception recently, and that is: where there is a conflict of authority between the State tribunals and those of the United States, the latter must have a preference until that question is determined. (Tarble's Case, 13 Wall., 406).

Hence, it seemed proper for us to present the petition to the Federal court. If the decree that we were not entitled to penalties or to interest is not to affect us hereafter, we do not care about it.

His honor held that the Federal court was rightfully in the possession of the property, though it had been previously levied on by the State for taxes. He should have granted the request of the State to sell the property under its executions, or should have ordered it sold subject to its claim. (Wiswall *vs.* Sampson, 14 How., 52.) He, in effect, held that the only remedy left the State was to accept the amount decreed by the Court. We might have been treated as in contempt if we had attempted to sell. (Devosser *vs.* Blackston, 6 Blatch., 235.) The question involved is of

transcendent importance, relating to the partition of power between the States and Federal Government. Mr. Madison has informed us that this task was no less arduous in the framers of the Constitution than that of combining the requisite energy and stability in government with the inevitable attention due to liberty and the republican form. (Ham. Fed., pp. 284, 285.) C. J. Taney declared it to be among the first duties of every court of the United States carefully to avoid trespassing upon the rights reserved to the States, and that it was the duty of this Court to reverse inferior tribunals when they exceeded their jurisdiction. (Taylor *vs.* Carryl, 14 How., 610.)

The State presented its petition denying the court's jurisdiction, but your honor went forward and decided exactly what its rights were, declaring that it was entitled to neither penalties nor interest, when, as we contend, that was a question alone for the courts in the State of Georgia to decide. That is all.

Mr. Justice BRADLEY: How can the plea affect the State of Georgia, anyway? The State of Georgia refused to be a party in the case.

Mr. ELY: Yes. It did.

Mr. Justice BRADLEY: The State of Georgia protested against the Court having any right to determine what was due to her, and under those circumstances the petition was dismissed. Then what did the court do? It ordered the sale of the property. Whether free from the execution of the State of Georgia or not, was another matter. It ordered the sale of the property. It had to ascertain what should be done with the proceeds, and it took the best means it had in its hands to get at it—the amount that was due the State of Georgia; and hoping, probably, that that would end the matter, directed that so much of the proceeds of the property of the amount of this execution should be paid to the State. But that does not conclude the State. I suppose

that money was paid the State, but how does it conclude the State? The State was not a party.

Mr. ELY: If your honors will only say so by the judgment of this Court, that is all we ask. But if the State had acquired prior jurisdiction on the property levied on, and since its claim was for taxes, your honors should have allowed their collection, as was done in the district court of New York.

In reply to the question as to whether it concludes the State, I think it does not, because the State of Georgia, as decided in the case of the Atlanta and Richmond Air-line R. R. Company *vs.* The State, (63 Ga., 483,) is not divested of its lien for taxes even by a sale of the property under a decree of the circuit court of the United States, though the tax *fi. fas.* had not been levied. That is a doctrine which has also been declared by this Court. (Osterburg *vs.* Union Trust Co., 93 U. S., 424.)

Mr. TOOMBS: I confess I entirely concur in the suggestion of the Court. I do not see any reason for taking up your honors' valuable time with this case. I am perfectly content that the Attorney-General shall allow the case to be dismissed.

Mr. ELY: If the case were dismissed, your honors, the judgment of the circuit Court would stand affirmed.

The CHIEF JUSTICE: Go on, Mr. Ely; the suggestions that have been thrown out by the different members of the Court, of course, you must undersand, are merely the individual suggestions of those members, and do not afford any indication as to what the judgment of the Court may be in the matter.

It occurs to me that you have gotten simply the tax lien of this property, with certain process issuing from the State authorities, for the collection of that tax. The State of Georgia was not a party to those proceedings, and is not, probably, bound by what has been done in the court below, but that is merely my individual opinion.

Mr. CHISHOLM: I think Mr. Ely had better be allowed to go on, your honors. I shall certainly contend and claim I can show this Court that the State of Georgia was a party.

Mr. ELY: If your honors please, in reference to the peculiar law of Georgia, and as to the manner in which a levy on realty is made, I will read the court from the case of Isaacs *vs.* Hooks, 46 Georgia, p. 309. "In this State a levy upon land is made by the entry of the sheriff upon the *fi. fa.* There is no actual seizure and there is no levy until the entry is made."

Ansley *vs.* Wilson, 50 Ga., 423.

Mr. Justice MILLER: What is the amount of these penalties?

Mr. ELY: $66,000 in round numbers.

Mr. Justice MILLER: Taxes and penalties.

Mr. ELY: The taxes were about $70,000. We have been paid the taxes.

Mr. Justice MILLER: The taxes and penalties for which you are now contending?

Mr. ELY: $66,000; penalties called for on the execution.

Mr. Justice MILLER: And the interest?

Mr. ELY: We do not claim any interest; but, according to the law of Georgia, if this corporation should come into our courts for the purpose of being relieved from penalties, our Court would say: "You must do equity before you ask equity, and you must pay the State interest on the *fi. fas.* from the time they were issued." (Wright *vs.* The State, 64 Ga., 800.) But to resume: It appears that there is no difference, whether it is realty or personalty; whether the *res* be one or the other, the doctrine of law obtains that a first seizure, a first possession, a first getting it into the control of the court, is the fact which determines the jurisdiction, and that all questions connected therewith are to be determined by the court that acquires jurisdiction.

There have been many efforts made in the courts of this

country to depart from that inflexible rule, that the first seizure, first possession, gives jurisdiction. In one case in Massachusetts it was sought to depart from this rule on the ground that the levy was tortious and illegal, and also on the ground that the attachment was against the property of "A," while it was levied on that of "B," but the court said that made no difference at all, so far as the question of jurisdiction was concerned; that all those were questions for the court that first obtained jurisdiction. So there have been many decisions of a similar character. In Booths cases, in 21 Howard, 506, the defence set up was that the act of Congress under which the fugitive slave had been remanded was unconstitutional and void, but Chief Justice Taney declared that that was a question with which the courts of Wisconsin had nothing whatever to do; that the validity of the process and the constitutionality of the legislation were questions for the determination of the court of the United States, and not of the State court.

In this case an effort is made to give the circuit court of the United States jurisdiction, on the ground, as his honor said in the court below, that the State had yielded it. Certainly there is nothing in the past history of the States that leads us to suppose that they would voluntarily release any portion of their reserved rights. The action of Georgia in refusing to appear at the bar of this Court to answer the suit of a private party is well known. The State was fortified by the eminent names of Marshall, Madison, and Hamilton, but the Court decided it had jurisdiction. This case and a contemporary one from Massachusetts led to the adoption of the 11th amendment to the Constitution. The exact question has the State of Georgia yielded jurisdiction.

The law relied on is the following section of the code:

"When an execution has been levied on property, and an affidavit of illegality filed to stay proceedings thereon, the property so levied on shall be subject to levy and sale under other execution, and the officer making the first levy shall

claim, receive, hold, and retain such amount of the proceeds of the sale as the court shall deem sufficient to pay the execution first levied, including interest up to the term of the Court at which said illegality shall be determined; and any bond given by the defendant on filing such affidavit shall be released and discharged, so far as relates to the property sold."

That was the main ground upon which his honor, as I think, claimed that the circuit court had jurisdiction. An analysis of this section will show—First, that the object of this provision of law is to declare under what circumstances property levied on is released from the sheriff's custody; secondly, it declares what shall be the duty of the courts and the levying officer with respect to the first suit; and, thirdly, it declares its effect upon releasing the bond. With this latter we have no concern.

I maintain that no plain person in reading this section would suppose that it had anything to do with the jurisdiction of concurrent tribunals.

In order to have concurrent jurisdiction there must be two tribunals. In order that a provision of law may refer to a question of concurrent jurisdiction, it must mention two tribunals. Here, there are no two tribunals mentioned. The only one that is mentioned is the court; *the* court, not *two* courts. It is true it does speak of two executions, but that does not necessarily imply the existence of two courts, for the same court can issues a number of executions. By the law of Georgia all affidavits of illegality are returnable for trial to the court which issued the execution.

By another law of Georgia all parties, with but few exceptions, are suable in the county of their residence. Therefore, when it speaks of two executions the probability is they would be issued by the same court. Accordingly, when it speaks of the second execution, levying on property, to which an affidavit of illegality had been interposed, we must suppose that it refers to the same court and not to a different court.

Then, I maintain that it is not clear that, even in the case of *fi. fas.* between private parties, that it has anything to do with the question of concurrent jurisdiction. The case of Schollenberger, cited by the appellees' counsel, decides in principle no more than that two *fi. fas.* from the Federal courts in Georgia can be levied on the same property when an affidavit of illegality has been filed. I maintain, however, that this being the kind of suit that it is, one in which the State is a party, and one for the collection of its revenue, it cannot possibly apply. Why? Because the rule of law is that a sovereign State does not lose its rights by implication. It must be clear; it must be precise; it must be definite, in order to divest sovereignty of jurisdiction.

Can you arrive at the conclusion that the purpose of this act was to confer jurisdiction upon a Federal court, except by implication?

Mr. Hamilton, in the Federalist, laid down this doctrine that sovereignty is not presumed to be waived, or alienated by implication, and the writers on the laws of nations agree with that idea.

Hence, we maintain it does not apply, in this case, to the State of Georgia. There is a second reason: that general statutes never bind the State unless it is named. It was so under the English form of government. The King was not bound unless he was expressly mentioned in acts of Parliament. These were maxims that were necessary for the administration of justice and government in England. "The King never dies." Not that it is literally true, for they have died. Your honors will find on my brief authorities cited that by the laws of Georgia public statutes do not bind the State, unless it is manifest from the language of the law that the intention is to include the State. But we cannot see in this section of the Georgia statutes any purpose to include the State in its terms. It was but a method of providing how private executions should be levied, and not tax *fi. fas.* in which the State is interested.

There is another provision of law in Georgia that declares that all cases in which the State is a party plaintiff shall have preference on the dockets of its courts over every other case whatsoever.

If property that was levied on by the State for its taxes could be taken possession of by another execution, delay would happen, because this second execution might itself be arrested by an affidavit of illegality. That issue must be tried, and delay would be caused, in contravention to that statute which declares that every case—every civil case in which the State is a party plaintiff—shall be tried speedily, and shall have preference over all other cases.

It does not apply to the State, because the very preceding section to that one, to wit, section 3668, declares, as the settled policy of the law of Georgia, that no judicial interference shall be had; nor shall any replevin be made of any property that is levied on by the State for its taxes. It has been the law of Georgia ever since 1804. It is the law of Georgia to-day, except that the act of 1874 allowed the railroads to file an affidavit of illegality; but because they allowed this privilege, does it follow that all the other consequences that attach to affidavits of illegality follow it? Because the levy on railroad property can be arrested by affidavit of illegality, can another affidavit, at the instance of a private party, come and take the property out of the possession of the State? No, I maintain not. Why? Because that same act of 1874 provided that all cases arising under affidavits of illegality, filed by railroad companies, should be tried by the courts of that State before any other cases whatsoever. The State guarded the privilege accorded to these companies of coming into the courts by requiring a speedy trial, so that as little delay should happen as was possible.

But, again, the law does not apply to the State, because it would be useless if it did. Why do I say so? Because the law of Georgia declares that all property in the tate is

bound for taxes. If the party alienates it himself after it becomes so bound, or if a bankrupt court sells it, or if the circuit court of the United States sells it, it does not divest the lien of the State. (Code of Georgia, sections 812, 813, 814; Doe *ex dem* Gladney *vs.* Deavors, 8 Ga., 479; Stokes *vs.* The State, 46 Ga.., 412.) Wright, Comp. Gen'l, *vs.* The S. W. R. R. Co., *supra.*

Surely, section 3669 was intended to apply only to cases where the second execution can sell the property and can give a good title to the purchaser; but as this cannot be done when taxes are involved, the act does not apply to the State at all.

So this Government has declared that all property in the possession of the United States under its revenue laws is irrepleviable, and subject only to the orders and decrees of the court.

His honor took the property from the custody of the State court and put it into the hands of the receiver.

An injunction would restrain the State from taking possession of it, but his possession by a receiver was more against the spirit and policy of the law than the issuing of an injunction.

The court had neither jurisdiction of the parties nor of the subject-matter. It did not have jurisdiction of the parties because it was a State; did not have jurisdiction of the subject-matter because that was in the prior possession of the State.

I believe, your honor, I have very nearly exhausted my time.

The CHIEF JUSTICE. You have been interrupted to some extent. I think you are entitled to further time. We will extend your time twenty minutes.

Mr. ELY. Thank your honor. I shall not occupy the whole of it unless it seem to be necessary.

Now, what is the conclusion? It is that this court had no jurisdiction of the matter. That must inevitably follow

unless we have strangely misinterpreted the law that is applicable to the case. The conclusion is that that section of the code relied upon, while it is possible that it may, in a case between private parties, allow the second execution to take the property, yet, where the State is a party, and especially where the State is a party for the collection of its revenues, can have no application.

His honor not only put his decision on the ground that that section of the code conferred jurisdiction, but he also placed it on another ground—that our levies were void. Why? Because he said we had levied upon detached portions of property of the railroad company that were essential to the operation of the road, and that under the law of Georgia the railroad must be sold as an entirety. I might concede all that. I might concede that everything that his honor said in the court below was true, and yet it does not affect this question at all. That was not a question for the circuit court of the United States to pass upon as to the validity of the seizure by the State courts of Georgia, or as to any of its processes by which it sought to enforce those executions. If the State of Georgia had jurisdiction of the tax, it had jurisdiction of every question pertaining to it. This Court has expressly so decided.

In the case of Freeman *vs.* Howe, in Taylor *vs.* Carryl, in Booth's cases, in Tarble's case, and I might mention many others, they have declared that the validity of the process is a question for the court that acquires the paramount right. What does the court acquire jurisdiction for, if it is not to go on and sell? What is the object of its getting possession of the *res*, if it is not to subject it to the process of the law? If a court is not competent for that purpose it must possess but limited authority.

The sole question is which tribunal first acquired possession. *Potior in tempore est potior in jure?* When this is ascertained there is an end to controversy. If questions concerning the regularity or validity of the process, or even the

jurisdiction of the court could be raised, a pretext would be furnished to evade a rule, the object of which is to promote peace and harmony. The principle is that the tribunal first getting possession of the *res* was the one to administer it fully as if no other ever had a concurrent authority. Hence we could safely admit the position claimed by the court without injuring our case, according to the view we take of it. But the law of Georgia has enacted that these tax executions should be issued, and they should be levied on the real and personal property of the defendant corporation. They were levied on them, and as a matter of fact several hundred thousands of dollars have been collected against these companies, the executions levied as these were, and no complaint has been made. Neither this company, nor its creditors or bondholders, could make this question in the courts of Georgia, because they would be required, as a condition precedent to equitable interference, to pay all the taxes apparently due. If the law is constitutional this Court cannot interfere, though the remedy to collect taxes be harsh, and the hardship great.

His honor complained that we wanted to cut up a railroad and sell it in parcels. His honor cut up our executions and allowed us only a part of them. He declared that a railroad was an artery of commerce that connected the various portions of the country together. Taxes are the life blood of the commonwealth. He said that we ought to go into equity and mould our judgments, so that we could sell the entire road. Would it be in accordance with the policy of Government to hold that the State has to resort to the slow process of a court of equity to collect taxes, when it is necessary to its very existence that the taxes should be collected promptly as well as that they should be collected at all?

As his honor, now presiding in this court, said, in a case in 13 Blatchford, as this Court has declared in 32 U. S., that the speedy collection of taxes is important. Now, how

could his honor hold—who ever heard that a State or any government had to resort to equity to collect its revenues? If, as he says, it is the doctrine of law that a railroad cannot be sold in its entirety, does not the transcendent importance of the collection of taxes take it from without the operation of that law? If the law declares that the property of railroads, real and personal, should be levied on, why is it not competent for the State to levy on it and sell it?

If his honor was right in saying that he had jurisdiction of the question, he must have gotten it under section 3669 of the Code. What does the code declare is the duty of the court? There is only one court spoken of, but suppose that notwithstanding all I have said that the section may still take property levied on out of the hands of the court that first levied on it and bring it into the circuit court of the United States, and that the court spoken of there means the last court and not the court to which the affidavit of illegality is returnable, and is to try it, what is the duty of that last court—the circuit court—in the instance proposed?

That section declares it. It provides that the officer making the first levy shall claim, receive, hold, and retain such an amount of the proceeds of the sale as shall, in the opinion of the court, be deemed sufficient to pay off the first execution levied, together with all interest, up to the time when the affidavit of illegality shall be determined. That section makes it his duty to retain it. I do not suppose any one will maintain that the circuit court of the United States had jurisdiction of this case entirely, because there is no provision of law to remove it. It could not be removed entirely into the circuit court.

If it could not be so removed, it was his duty to retain a sufficient amount of the proceeds to meet the execution when the issue of illegality was determined in the State courts. How much was that? In the absence of a trial it could only be what the executions called for on their face, together with interest on them up to the time of the

trial. The executions did call on their face for the penalties, therefore he must have retained the penalties. If he did not have the right to try it in all its entirety, he did not have the right to decide whether there were penalties due or not. If it was made his duty to retain a certain sum, he could only retain what was apparently due, together with interest up to the time of the court at which the affidavits of illegality shall be determined. It is useless to say any thing more on that point.

Now, as to the question of interest, your honors will find the case referred to in Georgia the only case I know of in reference to the payment of interest on taxes, where the Court declares that if these companies should go into equity they would be compelled as a matter of equity to pay interest on the taxes up to the time when they were due. That was the intimation of the Court.

It is said that the State is estopped because of the receipt of the proceeds of the sale. But how could this be, since it was not a party to the litigation, did not sign a receipt in full, and only received what the defendant corporation and all the creditors admitted to be due? It was not made a condition that the balance of the claim should be released. (R. R. Tax cases, 92 U. S., 575.)

There is just one other point to which I desire to allude, if my time is not exhausted.

The CHIEF JUSTICE: I regret to say your limit of time has expired.

Mr. ELY: If that be so, then I have nothing to do but to thank your honors for your kind indulgence.

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OFFICE SUPREME COURT U. S.
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SUPREME COURT OF THE UNITED STATES.

No. 109.

STATE OF GEORGIA, APPELLANT,

vs.

MORRIS K. JESUP, SURVIVING TRUSTEE, THE ATLANTIC AND GULF RAILROAD COMPANY, AND EUGENE KELLY AND SAMUEL A. STRANG, TRUSTEES; AND THE ATLANTIC AND GULF RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

BRIEF OF APPELLEES.

No. 109.

IN THE SUPREME COURT OF THE UNITED STATES.

STATE OF GEORGIA,
APPELLANT,
vs.
MORRIS K. JESUP, TRUSTEE, THE ATLANTIC AND GULF RAIL ROAD COMPANY AND EUGENE KELLY AND SAMUEL A. STRANG, TRUSTEES.

STATEMENT.

Prior to February 28th, 1874, the property of the Atlantic and Gulf Railroad Company was exempted from taxation, no higher tax than one-half of one per cent. upon the Company's annual net income, or the net proceeds of its investments could have been assessed and levied by the State.

Railroad Company *vs.* Georgia, 98 U. S., pp. 359, 360 and 361.

On the 28th day of February, 1874, the following Act was passed:

An Act to amend the tax laws of this State, so far as the same relate to Railroad Companies, and to define the liability of such companies to taxation, and to repeal so much of the Charters of such companies respectively as may conflict with the provisions of this Act.

§ 26. SECTION I. *The General Assembly do enact,* That, from and after the passage of this Act, the Presidents of all the railroad companies in this State shall be required to return, on oath, annually, to the Comptroller General, the value of the property of their respective companies, without deducting their indebtedness; each class or species of property to be separately named and valued,

so far as the same may be practicable, to be taxed as other property of the people of the State, and that said returns shall be made under the same regulations, provided by law for the returns of officers of other incorporated companies which are required by law to be made to the Comptroller General.

§ 27. SEC. II. *Be it further enacted*, That said Presidents shall pay to the Comptroller General, the taxes assessed upon the property of said railroad companies, and on failure to make the returns required by the preceding section, or on failure to pay the taxes so assessed, the Comptroller General shall proceed to enforce the collection of the same, in the manner provided by law for the enforcement of taxes against the other incorporated companies hereinbefore mentioned.

§ 28. SEC. III. *Be it further enacted*, That if any railroad company affected by the first and second sections of this Act desires to resist the collection of the tax herein provided for, said company through its proper officer, may, after making the return required in the first section in this Act, and after paying the tax levied on such corporation by the tax Act for 1873 and continuing to pay the same while the question of its liability under this Act is undetermined, resist the collection of the tax herein provided for by filing an affidavit of illegality to the execution or other process issued by the Comptroller General aforesaid, and stating fully and distinctly the grounds of resistance, which shall be returnable to the Superior Court of Fulton County, to be there determined as other illegalities, only the same shall have precedence of all cases in said Court as to time of hearing, and with the same right of motions for new trial and writs of error as in other cases of illegality on the part of the Comptroller General and of said corporation in which cases the Comptroller General shall be represented by the Attorney General of the State or such other attorney as the Governor may select, and if the grounds of such illegality be not sustained, the Comptroller General shall, after crediting the process aforesaid with amount paid, proceed to collect the residue due under the provisions of the Act, and if at any time during the pendency of any litigation herein provided for, the said corporation shall fail to pay the tax required to be paid as a condition of hearing, then said illegality must be dismissed and no second affidavit of illegality shall be allowed. Said illegality may be amended as other affidavits of illegality, and shall always be accompanied by good bond and security for the payment of the tax *fi. fa.* issued by the Comptroller General.

Section IV. Repeals conflicting laws, approved February 28th, 1874.

Acts of 1874, pp. 107 and 108.

On the 3d day of March, 1875, the foregoing Act was amended as follows:

§ 12. SEC. XII. *Be it further enacted by the authority aforesaid*, That nothing contained in this Act shall be so construed as to alter, change or repeal an Act approved February 28th, 1874, entitled, An Act to amend the tax laws of the State so far as the same relates to railroad companies, and to define the liability of

such companies to taxation, and for other purposes, but said Act is hereby ratified and confirmed, with the following amendments thereto, and which is hereby declared to be an amendment to and made by this Act a part of said Act approved February 28th, 1874, entitled, an Act to amend the tax laws of this State, and for other purposes therein named. And all railroad companies of this State shall be taxed upon their property as provided by the Act of February 28th, 1874, and hereafter should said companies, respectively, resist the payment of said *ad valorem* tax upon their property under the provisions of Section 3 of the Act of February 28th, 1874, they shall, in addition to the return required in Section 1 of said Act, make a return of all their gross income, or receipts of their net income, also to the Comptroller General, and shall pay a tax equal to the highest amount limited in their respective charters, to be ascertained by the Comptroller General as a condition precedent to the right to contest the payment of said tax upon their property.

Section XIII repeals conflicting laws.

Approved March 3d, 1875.

Acts of 1875, p. 118.

On the 19th of February, 1876, the foregoing Acts were confirmed as follows:

SEC. XIII. *Be it further enacted*, That nothing contained in this Act shall be so construed as to alter, change or repeal an Act approved February 28th, 1874, entitled, "An Act to amend the laws of this State so far as the same relate to railroad companies and to define the liability of such companies to taxation, and for other purposes," or to repeal so much of the "tax Act" approved March 3d, 1875, contained in Section 12 of said Act, which relates to the imposition of tax upon railroads, but said Act of 1874 and Section of the Act of 1875, are hereby ratified and confirmed.

Section XIV repeals conflicting laws.

Approved February 19th, 1876.

Acts of 1876, p. 138.

On the 21st day of February, 1877, the foregoing Acts were amended and confirmed as follows:

§ 15. SEC. XIII. *Be it further enacted by the authority aforesaid;* That nothing contained in this Act shall be so construed as to alter, change or repeal an Act approved February 28th, 1874, entitled an Act to amend the laws of this State, so far as the same relate to railroad companies and to define the liability of such companies to taxation and for other purposes, or to repeal so much of the tax Act approved March 3d, 1875, contained in Section 12 of said Act, which relates to the imposition of tax upon railroads, but said Act of 1874, and Section 12 of the Act of 1875 are hereby ratified and confirmed, and in the event of the refusal by any railroad company to pay the tax provided in said Act of February 28th, 1874, on account of exemption in the charter of such company, it shall be the duty of the Attorney General, when directed

by the Governor, to institute proceedings to ascertain whether or not the charter of such company is liable to forfeiture by reason of any violation of its provisions, and the result of such proceeding shall be reported to the General Assembly.

Approved February 21st, 1877.

Acts of 1877, p. ~~115~~ 124, 125.

Under the provisions of the said Tax Act of 1874, the President of the Atlantic and Gulf Railroad Company returned the property of the company to the Comptroller General for assessment, and otherwise complied with the requirements of that statute. The Comptroller assessed a tax against the company of $32,764.70 and issued a tax execution for its collection. The execution was levied upon lots numbers 23 and 24, Atlantic Ward, in the city of Savannah, the *depot* of the company.

Record, pp. 46 and 47.

This execution was arrested by an affidavit of illegality under the provisions of the said Act of 1874. The cause was tried before the Superior Court of Fulton County. The Court overruled the affidavit and gave judgment "that the execution proceed." A Writ of Error was sued out to the Supreme Court of Georgia and the judgment of the Superior Court was affirmed.

Atlantic and Gulf Railroad Company *vs.* Georgia, 55 Ga., 312.

This case was then taken to the Supreme Court of the United States and there affirmed.

Railroad Company *vs.* Georgia, 98 U. S., p. 359.

Under the provisions of the said Act of 1874 as amended by the said Act of 1875, the Comptroller General, upon a return made by the President of the Atlantic and Gulf Railroad Company, further assessed a tax on the property of said Company to the amount of $8,754.55. An execution for said taxes was issued on the 3d day of November, 1875, and was levied upon "the buildings known as the Machine Shop, Locomotive House and Car Shop, situate, lying and being at the Atlantic and Gulf Railroad *depot*, in the city of Savannah."

Record, pp. 45 and 46.

This execution was arrested by an affidavit of illegality under the provisions of the said Act of 1874 as amended by the said Act of 1875. The issue was tried before the Superior Court of Fulton County, and the affidavit of illegality was sustained and the levy

dismissed. A Writ of Error was sued out by the State to the Supreme Court of Georgia, and the decision of the Superior Court was reversed.

The State *vs.* the A. & G. R. R. Co., 60 Ga., 269.

The railroad company then sued out a Writ of Error to the Supreme Court of the United States. Upon the hearing the judgment of the Supreme Court of Georgia reversing the judgment of the Superior Court was affirmed and the execution was ordered to proceed.

Railroad Company *vs.* Georgia, 98 U. S., p. 366.

These decisions of the Supreme Court of the United States were rendered during the October term, 1878.

Under the provisions of the said Acts of 1874, 1875 and 1876, upon a return made by the President of the Atlantic & Gulf Railroad Company, the Comptroller General assessed a tax of $9,080.31, and the further sum of $18,160.62 as a *penalty for default in payment* of said tax, making a total sum of $27,240.93, and issued an execution therefor on the 2d November, 1876.

This execution was said to have been levied upon lots in the City of Savannah as lots numbers 23 and 24, 35 and 26, (the company's depot.)

Record, p. 47.

The levy, however, was not notified to the proper officers of the Atlantic & Gulf Railroad Company, nor was it advertised. The Company never had an opportunity of filing an affidavit of illegality thereto.

The intervention of the State of Georgia says, "Fi. fas were issued also by your petitioner against said company for taxes for the years 1876, 1877 and 1878, but as the grounds of defense set up were the same in all, the latter *were allowed to rest and abide the decision of the Courts in the two former cases*, excepting that the first named fifa of the later class, to wit: that for the year 1876 was in the hands of the Sheriff of Chatham County, and had by him been levied upon certain property of said railroad company before the appointment of a Receiver." This levy was nothing but a secret endorsement made by the Sheriff.

Record, p. 47.

The execution issued on November 2d, 1877, is endorsed by the Sheriff as follows: "Property by order and decree of the United States Court now in the hands of Receivers."

Record, p. 48.

The execution issued March 18th, 1879, was never placed in the hands of the Sheriff.

Record, p. 49.

All of these executions for taxes were withheld from the Receivers, and no demand for payment was made until they were taken from the hands of the Sheriff and presented to the Circuit Court of the United States on the 3d day of June, 1879, as part of an intervention in said cause filed by the Attorney General of the State.

This intervention, after setting out the tax executions, and insisting that the State cannot be made a party, maintains:

"Firstly. This honorable Court has no jurisdiction, by process of injunction or otherwise, to hinder, delay or prevent the collection of her revenue."

Secondly. As the records show that certain of these *fi. fas* had been levied by the Sheriff in obedience to process from the State Courts, upon which issues had been joined by the defendant corporation, their jurisdiction could not be affected by a suit filed subsequently in the Courts of the United States. The appointment of Receivers and a sale by the latter jurisdiction would be inoperative and void."

"Thirdly. It is against public policy to require a State in the collection of her revenue to await the slow and tedious process necessary to determine the numerous issues made in this cause between private litigants."

"Wherefore your petitioner prays that this honorable Court may pass such an order as may fully protect the rights of the State in the premises, and petitioner, as in duty bound, will ever pray."

The right of the State to proceed with these tax executions was elaborately argued by the Attorney General of the State.

The opinion of the Court concluded as follows:

"But the lien of the State for taxes does not depend on any execution or levy. It is declared by the Code and is an independent lien and this Court will take care that the full right of the State shall be preserved so far as it shall be judicially brought to our notice. The application for leave to proceed with the execution is denied."

Georgia *vs.* Atlantic & Gulf Railroad Company.

3 Woods, p. 440 and 441.

And the following order was passed: "The State of Georgia having petitioned the Court for *leave to proceed* with certain fi. fas for taxes after argument and consideration: It is ordered and decreed that the said petition be denied, and the same is hereby dismissed."

"June 6th, 1879."

Subsequently the entire cause came on to be heard and the Attorney General in behalf of the State claimed the principal and penalties in said executions with interest. The Court rendered a decree from which the following extracts are quoted:

DECREE.

These causes came on to be further heard together upon the bills and answers in the above stated causes and the various interventions filed in the same, and were argued by counsel, and thereon, upon consideration thereof, it was, upon the 6th day of June, 1879, ordered, adjudged and decreed as follows, to wit: * * *

Sixth. It is further declared, adjudged and decreed that the said defendant is indebted to the State of Georgia for taxes the following amounts, to wit:

For the year 1874, principal, - - - - -		$32,764 71
" " 1875, " - - - - - -		8,754 55
" " 1876, " - - - - - -		9,080 31
" " 1877, " - - - - - -		12,441 16
" " 1878, " - - - - - -		7,076 26
Aggregating, - - - -		$70,116 99

And also the principal sum of such tax as may be asesssed by the Comptroller General of the State of Georgia for the year 1879, that such taxes are prior to all other liens except judicial costs; that neither penalty nor interest is due on the taxes for any one of the aforesaid years, 1874, 1875, 1876, 1877 and 1878, and the principal sums to be due for the year 1879, when the same shall be assessed by the Comptroller General shall be held out of the proceeds of the sale hereinafter after decreed subject to the demand of the State of Georgia.

After this decree was rendered the State of Georgia filed in the office of the Clerk of the Circuit Court, as part of the cause, the said tax executions, and they were endorsed "Filed August 22, 1879. W. M. Heyward, Deputy Clerk U. S. C. C."

An appeal was filed in this Court on the 20th October, 1879, but it does not appear from the record that the State was or is dissatisfied with the final decree entered on the said 6th day of June, 1879, but only with the first decretal order which denied leave to the State to proceed with said executions through the County Sheriff, and to that extent dismissed the petition.

Record, pp. 49, 53, 58.

The appearance of the State afterwards and the assertion of her claim for penalties and interest, was a waiver of any right which she had to an appeal from the decretal order alone. Even a sovereign State should not be allowed to invoke the decree of a Court,

and when that decree is against her to assume the position that the Court had no jurisdiction to render it.

Under the final and general decree of June 6th, 1879, the railroad and other property of the Atlantic & Gulf Railroad Company was sold on the 4th day of November, 1879, and partly for the purpose of paying the taxes found to be due to the State of Georgia. There was no supersedeas of this decree.

The Receivers who were appointed special masters to make the sale reported their action to the Court November 10th, 1879, in which report they informed the Court that the sale had been made, the purchase money paid, and was in their hands to be disposed of as the Court shall require, etc.

Supplemental Record, pp. 3, 4.

The purchaser also commenced proceedings to have the sale confirmed on the said 10th of November, and made the State a party. Service was acknowledged by the Attorney General for State as follows:

"I acknowledge service of this Rule Nisi, but disclaim that the State is a party."

ROBERT N. ELY,
Attorney General.

Supplemental Record, p. 7.

Afterwards a further acknowledgment of service was made as follows:

"Due and legal service of a copy of the above described order acknowledged. All further and other service and notice of said order waived.

"ROBERT N. ELY,
"Attorney General of Georgia.

"This November 10th, 1879."

Supplemental Record, p. 9.

The Attorney General seems to have been very cautious. He made two acknowledgments of service. In one of them he "disclaims that the State is a party." In the other he does not. His record, however, is consistent, the State as he claims was and is a party whenever there was a decision in her favor only, and not otherwise.

The State made no resistance or objection to the confimation and the final order was passed in open Court November 19th, 1879.

Supplemental Record, p. 10.

Afterwards, on the 29th of November, 1879, the State having again been cited to appear, and on the hearing having been represented by counsel, the following order was passed:

It appearing to the Court that the State of Georgia intervened in the above causes on the third day of June, A. D. 1879, and asked

to be allowed to proceed with certain tax fi. fas. against property of the said Defendant corporation, and prayed that this Court might pass such an order as would fully protect the rights of the State in the premises; and it further appearing to the Court that the request of the State to be allowed to proceed with said tax fi. fas. was refused, and the said intervening petition was so far denied, but, in order that the rights of the State might be fully protected in accordance with the prayer of said petition, this Court did examine into and adjudicate upon the claims of the State against said Defendant, and in and by its decree, granted in said causes on the sixth day of June, A. D. 1879, did declare, adjudge and decree that the Defendant was indebted to the State of Georgia, for taxes, the following amounts, to-wit:

For the year 1874, principal,	- - - - -		$32,764 71
" " 1875, "	- - - - -		8,754 55
" " 1876, "	- - - - -		9,080 31
" " 1877, "	- - - - -		12,441 16
" " 1878, "	- - - - -		7,076 26
Aggregating,	- - - -		$70,116 99

And also the principal sum of such tax as might be assessed by the Comptroller General of the State of Georgia for the year 1870; that such taxes were prior to all other liens except judicial costs; that neither penalty nor interest was due on taxes for any one of the aforesaid years, and that the said principal sums due for the years 1874, 1875, 1876, 1877, 1878, 1879. when the same shall be assessed by the Comptroller General, should be held out of the proceeds of the sale of the property of the said defendant company, subject to the demand of the State of Georgia.

And it further appearing to the Court that the taxes due to the State of Georgia by said defendant for the year 1879 have been since said decree was granted, assessed by the Comptroller General and paid by the Receivers appointed in said causes. And it further appearing to the Court that the property of said Defendant has all been sold and the proceeds of such sale, amounting to the sum of three hundred thousand dollars, have been paid by the purchaser to said Receivers and that said sale has been confirmed. And it further appearing to the Court that the State of Georgia has had due notice of this decree, and is represented by its counsel now in Court.

It is therefore ordered, adjudged and decreed that said sum of seventy thousand one hundred and sixteen dollars and ninety-nine cents ($70,116.99) being the amount found to be due to the State of Georgia for its taxes for the years 1874, 1875, 1876, 1877 and 1878, as found and provided in and by said decree granted June 6th, 1879, be paid by said Receivers out of the proceeds of the sale of said property into the registry of this Court and that the same be there held subject to the demand of the State of Georgia.

W. B. WOODS, Judge.

November, 29th, 1879.

R. TOOMBS, for the State.
W. S. CHISHOLM, for Complainants

(Attached to foregoing order is the following letter):

SCREVEN HOUSE,

G. W. SERGENT.

SAVANNAH, GA., Nov. 30, 1879.

Dear Judge—Please say to the Receivers of the Atlantic and Gulf Railroad Company that I prefer that they should not pay over the money in their hands due the State of Georgia for taxes into Court until further instructions from me. I have explained to their counsel, General Lawton, the reasons for delay.

Very truly yours,

R. TOOMBS,
Attorney for State.

JUDGE CHISHOLM,
Savannah, Ga.

Afterwards the following check was issued in payment of the taxes due the State on demand of the State of Georgia as directed by the order of Court. See *ante* page 13:

The taxes ordered to be paid amounted to - -	$70,116 99
From which deduct 1 per cent. Clerks registry fee -	701 16
Leaving balance covered by check, - -	$69,415 83

No. 9.—REGISTRY OF UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF GEORGIA.

M. K. JESUP, Trustee,
vs.
ATLANTIC AND GULF RAILROAD.

Final Decree.
Filed 20th day of June, 1879.

$69,415.83.

SAVANNAH, GA., March 23d, 1882.

MERCHANTS' NATIONAL BANK.

Pay to the order of R. N. Ely, Attorney General for the State of Georgia, the sum of sixty-nine thousand four hundred and fifteen dollars and eighty-three cents, and charge to the fund deposited in the above stated cause.

W. B. WOODS, U. S. Judge.

Entered and recorded this 22d day of April, 1880.

WILLARD P. WARD, Clerk.

(Endorsed) ROBERT N. ELY,
Attorney General.

Supplemental Record, pp. 12, 13 and 14.

POINTS AND AUTHORITIES.

I.

JURISDICTION OF THE CIRCUIT COURT.

When the Receivers were appointed in the original cause of Jesup, surviving trustee *vs.* The Atlantic & Gulf Railroad Company, on the 22nd day February 1877, no portion of the property of the Company was in the possession or control of the Sheriff of the County of Chatham, or any other State officer.

A levy had been made and endorsed on the tax executions issued for taxes of 1874 and 1875. But as provided by law affidavits of illegality had been filed in each case with bond and the property was subject to other levies.

Code of 1873, § 3669. "Property may be sold under other executions. When an execution has been levied on property, and an affidavit of illegality filed to stay proceedings thereon, the property so levied on shall be subject to levy and sale under other execution and the officer making the first levy shall claim, receive, hold and retain such amount of the proceeds of the sale as the Court shall deem sufficient to pay the execution first levied including interest up to the time of the Court at which said illegality shall be determined; and any bond given by the defendant on filing such affidavit shall be released and discharged so far as relates to the property sold."

The United States Courts are domestic courts and this statute applies to process from them as well as from the State Courts.

Ex. Parte Schollenberger, 96 U. S., p. 369.
Georgia *vs.* The A. & G. R. R. Co., 3 Woods, p. 434.

Code of Georgia (1873), § 890: "Sales under tax fi. fas. Sales under tax fi. fas. shall be made under the same rules governing other judicial sales."

And the Act of 1874 prescribes that the affidavit of illegality authorized by this Act shall be returned to the Superior Court of Fulton County and there determined as "*other illegalities.*"

The Sheriff never took possession of any property under the execution issued on the 2d day of November, 1876.

He endorsed a levy on said execution that he had "levied upon the following described property: Lots of land in the city of Savannah known and designated on the map or plan of said city as lots numbers 23 and 24, 35 and 36, and I will advertise and sell the same in terms of the law, to satisfy said *fi. fa.*"

Record, p. 47.

The city of Savannah is divided into various wards, and in each ward there are numbers 23, 24, 35 and 36. The levy does not specify the ward, the lots cannot be identified from the levy and they

are not even described as the property of the Defendant. The Company had no notice of the levy, such as it was, the property was never advertised for sale under it, but the endorsement was made and kept a secret. The intervention of the State alleges that *fi. fas.* were issued against the Company for taxes for the years 1876, 1877 and 1878, but as the grounds of defense set up were the same in all, they were allowed "*to rest and abide* the decision of the Courts in the two former causes."

Record, p. 44.

Upon the fi. fa. for 1877 the Sheriff made the following endorsement: "Property by order and decree of the United States Court *now* in hands of Receivers."

"November, 1877."

Code (1873) § 3640: "The officer making a levy shall always enter the same on the process by virtue of which such levy is made, and in such entry shall plainly describe the property levied on, and the amount of the interest of defendant therein."

Brooks and another and Rooney and another, 11 Ga., 423.

Whatley *vs.* Newton, 10 Ga., 77.

Anderson *vs.* Lee, 53 Ga., 189, 191.

Code of Georgia (1873), § 4872.: "Ordinances of the city of Savannah how evidenced. All ordinances, by-laws, rules and regulations of said city, published by authority of said Mayor and Aldermen and promulged as such by said authority, shall be evidence in all courts of this State, to the same extent that laws of the State, as published by authority, shall be evidence of such laws." * *

In 1867 there were in the city of Savannah sixty-seven wards.

City Code, p. 120 and 121.

Chatham and Monterey Wards have each 48 lots and numbered from 1 to 48.

City Code, p. 107.

And so on, it will appear that each ward contains a certain number of lots which are numbered from one upwards.

For the reason then that the levies on the fi. fas. of 1875 and 1876 do not describe the interest of the Defendant therein they were void and did not pass any title or right of possession to the Sheriff. The levy on the fi. fa. of 1876 is also void for the further reason that the description of the lots is too vague and uncertain. They could not be identified or located.

And, again, so far as the levy of the fi. fa. of 1876 is concerned, neither the State nor Sheriff can claim any title or possession

thereunder paramount to that of the Receivers; because the State withdrew the execution from the Sheriff to hold it up to await the decisions of the Courts in the other two cases, and because the Sheriff admitted by his return on the fi. fa. of 1877, that all the property of the Defendent corporation was in the hands of the Receivers and beyond his possession, control and jurisdiction.

The levies endorsed upon each of the executions for 1874, 1875 and 1876 were all void for another reason, and the executions could not have proceeded in terms of the application of the State. The depot grounds and buildings alone of the company were claimed to have been levied upon.

The property of a railroad company can not be sold in parcels.

At least its principal terminal depot can not be sold apart from the road.

Macon and Western R. R. Co. *vs.* Parker, 9 Ga., p. 377.
City of Atlanta *vs.* Grant, *et al*, 57 Ga., p. 340.
Wilmer *vs.* The Atlantic and Richmond Air Line Co., 2 Woods, p. 453.

II.

PENALTIES.

The position taken, by the State in the Circuit Court, was that she asked leave to allow the Sheriff of Chatham County to take out of the hands of the Receivers the depot grounds of the Atlantic and Gulf Railroad Company and sell them to satisfy the tax executions; but if this was denied, that then the Court would "pass such an order as may fully protect the rights of the State in the premises."

Record, p. 45.

The order however which the State, through her representative, the Attorney General, wished passed "to fully protect the rights of the State," was a decree finding that there was due the State not only the amounts assessed but also a penalty of three times the assessment.

This claim was asserted under the following sections of the Code of Georgia:

"Code § 876. *Defaulting Corporations.* If any corporation, company, person, agency or institution, who are required to make their returns to the Comptroller General shall fail to return the taxable property, or specifics, or pay annually the taxes for which they are liable to the State Treasurer, the Comptroller General shall issue against them an execution for the amount of taxes due according to law, together with the costs and penalties."

"§ 877. *Delinquent Corporations—penalty.* The penalty against all such corporations shall be the forfeiture of their charters, and if not chartered by this State, then the immediate suspension of their business therein."

"§ 878. *Penalty when there is no special provision.* The penalty or default tax on banks, railroads and other corporations where there is no special provision, shall be three times the amount of their lawful tax."

It is not necessary to cite any authorities in support of the proposition that the right to inflict these penalties should be clearly shown to exist.

The foregoing provisions of the Code were general and applicable to all defaulting and delinquent corporations, and were of force prior to the passage of the said Acts of 1874, 1875, 1876 and 1877.

The Act of 1874 inaugurated a new policy as to the taxation of railroads. Before its adoption, partial exemption from taxation had been claimed by many railroad companies under their special charters, and no attempt had been made to interfere with such claim. Liberal provisions were made in the Act for testing the rights of the corporations. The settled policy of the State, which forbade judicial interference with the collection of taxes, was departed from, and the corporations were permitted to go into the Court and have their rights settled. The reason for this course was obvious; grave and serious questions were involved in the case of nearly all the railroads in Georgia. From their birth they had been enjoying partial exemption from taxation, and it was generally believed that this immunity could not be taken from them. It was but an act of simple justice to provide a remedy by which the corporations might obtain an adjudication of their rights. Can it be possible that this apparently liberal policy was but a subterfuge, a legal fraud, by which each corporation was to be assessed a heavy penalty in every case of unsuccessful, but bona fide resistance in the Courts, according to the terms and conditions of the said Acts?

Any company which bona fide availed itself of the terms of said Acts was not a defaulter or a delinquent for complying with, and proceeding in obedience to the provisions of the statute.

The penalties claimed in the executions for 1876, 1877 and 1878 are three times the amount of the lawful tax. This is under the said § 878 of the Code. That penalty, however, can not be enforced, except in cases where there are "no special provisions." Under these statutes of 1874, 1875, 1876 and 1877, there are special provisions which take the case out of the authority of the said section. Railroads resisting the payment of the tax are allowed to file an affidavit of illegality, but they are compelled to pay a tax assessed under the Act of 1873, and continue to pay the same while the question of liability under the Act of 1874 and Amendments is undetermined. "And if the grounds of such illegality be not sustained, the Comptroller General shall, after crediting the process aforesaid unto the amount paid, proceed to collect the *residue due*, and if, at any time during the pendency of any litigation herein provided for, the said corporation shall fail to pay the tax required to be paid as a condition of hearing, then said illegality shall be dismissed and no second affidavit shall be allowed."

The maxim "*expressio unius, exclusio alterius*," is clearly applicable in this case. In declaring what shall be collected, the Act of 1874 and Amendments, not only have "special provisions" which take the case away from § 878, but prescribe as distinctly as possible without using the identical words, that no penalties are to be collected, in cases where the terms of the Act are pursued.

Again, the Acts of 1874 and 1875 were amended and a "special provision" was made for a penalty in all cases under those acts. The special provision is as follows: "And in the event of refusal by any railroad company to pay the tax provided in said Act of February 28th, 1874, on account of exemption in the charter of such company, it shall be the duty of the Attorney General when directed by the Governor, to institute proceedings to ascertain whether or not the charter of such company is liable to forfeiture by reason of any violation of its provisions, and the result of such proceeding shall be reported to the General Assembly."

Acts of 1877, p. 125. Feby 27. 1877.

The State cannot complain that the taxes for 1876, 1877 and 1878 were not earlier paid. She never allowed the Company or the Receivers any opportunity to file an affidavit of illegality or to pay them. She held them back to await the decision of the Courts in the other two cases. She treated them as if illegalities had been filed, and the cases continued for the decision in the other causes.

In speaking of the said Act of 1874, the Supreme Court of Georgia has used the following language:

"We do not think that equity will allow penalties to be exacted in this case. The Company seems to have acted with a desire to pay all the taxes it believed to be due, and tried to ascertain what was due in the manner pointed out by the Act of 1874, and failed to make itself heard by the conduct of the Comptroller General in not sending it a schedule of full returns, but only of its income. It had the right to test the legality of the tax by the Act of 1874." * * * * * * "By its legislation in 1874 and the following years, the State unquestionably indicated its wish that a fair trial on law and facts should be accorded to these corporations in respect to taxes levied by the Comptroller General."

Wright, Comptroller, *et al. vs.* The Southwestern Railroad Co., 64 Ga., 799, 800.

III.

INTEREST.

In the Circuit Court the State wanted, first, to be allowed to proceed and by the State Sheriff sell the depot of the company to pay these executions; second, if this leave was not granted, she asked for penalties on each execution; and third, if she could not obtain either of these, then she wanted interest on the taxes.

The law as to what demands bear interest in the State of Georgfa is contained in the following sections of the Code:

"§ 2053 (2027). *Lex loci.* Every contract bears interest according to the law of the place of the contract at the time of the contract, unless upon its face it is apparent that the intention of the parties referred the execution of the contract to another forum; in this case the law of the forum shall govern."

"§ 2054 (2028). *Interest on Judgment.* All judgments in this State bear lawful interest upon the principal amount recovered."

"§ 2056 (2030). *Interest on Liquidated Demands.* All liquidated demands, where by agreement or otherwise, the sum to be paid is fixed or certain, bear interest from the time the party is liable and bound to pay them; if payable on demand, from the time of the demand. In case of promissory notes payable on demand, the law presumes a demand instantly, and gives interest from date."

"§ 2057 (2031). *On Merchants' Accounts.* All accounts of merchants, tradesmen, mechanics (and all others), which by custom become due at the end of the year, bear interest from that time upon the amount actually due whenever ascertained."

Taxes are neither judgments nor contracts.

Pierce *vs.* Boston, 3 Met., p. 520.
City of Augusta *vs.* North, 2 Amr. R., p. 55.

Taxes are not embraced under the word "debts" in a statute, and therefore not under the word "liquidated demands."

Lane *vs.* Oregon, 7 Wall, p. 80

The assessment of taxes does not create a debt upon which a promise to pay interest can be implied.

Danforth *vs.* Williams, 9 Mass., p. 324.
Shaw *vs.* Rockwell, 26 Vermt. p. 486.
Camden *vs.* Allen, 2 Dutcher, p. 398.
S. C. cited, 7 Wall., p. 80.
Haskell *vs.* Barblet, 31 Call, 281.
S. C., cited in Cooley on Taxation, p. 13, note.
vs. Oliver, 34 Call, 246.
S. C., cited in Cooley on Taxation, p. 200, note 4.

Practice and custom of the Executive Department should be considered in construing tax laws.

Miller *vs.* Wilson, 60 Ga., p. 505.

The issuing of tax fi fas. is the act of the Executive and not the Judicial Department.

Scofield *vs.* Perkerson, 46 Ga., p. 360.

It has never been the practice in Georgia to collect interest on tax executions. This is shown by the form of the writ. It does not call for interest, and the officer would not be justified in collecting interest. This difficulty was admitted by the State in the case of The Atlanta & Richmond Air Line Railroad *vs.* The State. 63 Georgia, p. 487.

The State moved the Court to issue new fi fas for principal and interest, but the motion was denied. The Supreme Court affirmed

the judgment and added, "the Court below did not render any judgment upon the question of interest, nor do we express any opinion on that point."

If then there was no obligation by statute or by contract, express or implied to pay interest, it could only be recovered as a penalty imposed for withholding the taxes. "Interest is a penalty for withholding a debt."

Harris *vs.* Allen, 18 Ga., 177.

As damages interest is in the discretion of the court or jury.

Sedwick on Damages, Mar., pp. 386 and 387.

Certainly a penalty even in the form of interest should not be imposed upon the company for withholding payment of the taxes until it was ascertained according to the provisions of the law that they were due.

And more particularly is this true of the executions of 1876, 1877 and 1878, which in the language of the Appellants intervention, "were allowed to rest and abide the decisions of the courts in the two former cases."

Interest is not claimed in any of the executions. Penalties are not claimed "in the two former causes," but are claimed in the three latter fi. fas. If these three latter are to abide the decisions of the courts in the two former causes they can proceed for the collection of the taxes only, without penalties and without interest.

When the two former causes were before this Court, 98 U. S., p 359, the Attorney General moved for "interest in error" and it was refused. The State is now bound by that ruling; it is *res adjudicates*. As to "interest in error," see

Sedgwick on Damages, m. p. 387, 388 (7th edition.)

In all the cases where interest has been allowed on taxes, there has been some statute on the subject, or the tax payer had been compelled to resort to equity for relief on account of some mistake, or negligence or omission of duty. This case has no such elements connected with it in any of its branches. And the Company is not called upon to offer to do any equity as a condition precedent to relief.

IV.

After this case had been appealed to this Court, the State of Georgia demanded the money found to be due on the tax fi fas in question by the decree of the Circuit Court, and the same was paid to its Attorney General from the registry of the Court where it had been deposited subject to its order. There is therefore no question left for this Court to decide; the State has ended the litigation by

demanding and receiving the sum found to be due by Circuit Court in the decree, and also in the supplemental order of November 29th, 1879, from which no appeal has been taken.

The principal due was paid into the registry of the Court, subject to the demand of the State. She has accepted the same, and can not now, in this case, where there is no contract to pay interest, maintain a suit therefore.

Sedgwick on Damages, 7th edition, m. p. 389.
Dixon *vs.* Parkes, 1 Esp., 110.
Tillotson *vs.* Preston, 3 Johns., 229.
Fake *vs.* Eddy, 15 Wend., 176.
American Bible So. *vs.* Wells, 68 Me., 572.
S. C. 28th, Amer. Rep. 82.

W. J. Chisholm
R. Taccignant